United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,943

926

JAMES R. WILLIAMS,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Appeal from a Decision and Orders of the
Federal Communications Commission

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,943

JAMES R. WILLIAMS,

Appellant,

v.

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Appellee.

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JOINT APPENDIX

INDEX

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES R. WILLIAMS,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 18,943
	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	
	)	
Appellee.	)	

PREHEARING STIPULATION

Counsel for the respective parties to the above-entitled appeal hereby stipulate as follows:

I. The questions presented by this appeal are as follows:

1. Whether the Commission's reference to the failure of Appellant to submit evidence concerning his proposed program service was prejudicial in light of an earlier Commission ruling that addition of an issue concerning Appellant's proposed program service was not justified.

2. Whether the Commission properly weighed and considered all of the relevant and material evidence concerning the unique Indian characteristics, population and institutions of Anadarko and the surrounding area, the need for a local radio service, and the absence of any meaningful program service from any existing station.

3. Whether the Commission erred by refusing to set aside the ruling of the Hearing Examiner rejecting evidence offered for the purpose of supporting a waiver of Section 73.28(d)(3) of its Rules, the so-called "10% Rule."

4. Whether the Commission erred by failing to grant a waiver of Section 73.28(d)(3) of its rules.

5. Whether Section 73.28(d)(3) of the Commission's Rules, as interpreted and applied in this proceeding, violates the basic purposes for which the Commission was created and various provisions of the Communications Act of 1934, as amended, including Sections 301, 303, and 307(b).

II. The joint appendix shall be filed within 10 days after the filing of the Appellant's reply brief, or, if the Appellant does not file a reply brief, then within 25 days after the filing of the brief of Appellee.

III. In preparing briefs, the parties shall, when referring to record material, indicate the page or pages in the original record where such material may be found. The pages of the joint appendix shall be consecutively numbered and shall, in addition, bear appropriate record page numbers, so that the reference to the record material printed in the joint appendix may be found.

Respectfully submitted,

/s/ Robert M. Booth, Jr.

Joseph F. Hennessey

BOOTH & LOVETT
1735 DeSales Street, N.W.
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Counsel for Appellant
JAMES R. WILLIAMS

November 10, 1964

Howard Jay Braun
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Counsel for Appellee
FEDERAL COMMUNICATIONS COMMISSION

November 10, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,943 September Term, 1964

James R. Williams v.
Federal Communications Commission

Before: Wright, Circuit Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: Nov. 16, 1964.

[R. 81] [R. 81]

Before the
FEDERAL COMMUNICATIONS COMMISSION

B
FCC 62-506
18916

In re Applications of	
Harwell V. Shepard tr/as OLNEY BROADCASTING COMPANY Olney, Texas	Docket No. 14639 File No. BP-10494
Requests: 540kc, 250w, DA-D, Class II	
JAMES R. WILLIAMS Anadarko, Oklahoma	Docket No. 14640 File No. BP-13635
Requests: 540kc, 250w, D, Class II	
For Construction Permits	

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 9th day of May, 1962;

The Commission having under consideration the above-captioned and described applications;

IT APPEARING, That, except as indicated by the issues specified below, each of the instant applicants is legally, technically, financially, and otherwise qualified to construct and operate the instant proposals; and

IT FURTHER APPEARING, That the following matters are to be considered in connection with the aforementioned issues specified below:

1. The subject proposals appear to involve mutually destructive interference.
2. The proposal of James R. Williams appears to cause objectionable interference to the existing operations of Stations KWMT, Ft. Dodge, Iowa and KNOE, Monroe, Louisiana.
3. The proposal of James R. Williams may receive interference from existing stations which would affect more than ten percent of the population within the proposed primary service area in contravention of Section 3.28(d)(3) of the Commission's Rules.

IT FURTHER APPEARING, That, in view of the foregoing, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience, and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues set forth below:

[R. 82]

IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the instant applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the areas and populations which would receive primary service from the instant proposals and the availability of other primary service to such areas and populations.
2. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and the interference that each of the instant proposals would receive from all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
3. To determine whether the instant proposal of James R. Williams would cause objectionable interference to Stations KWMT, Ft. Dodge, Iowa and KNOE, Monroe, Louisiana, or any other existing standard broadcast stations, and, if so, the nature and extent thereof,

the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

4. To determine whether interference received from existing stations would affect more than ten percent of the population within the normally protected primary service area of the instant proposal of James R. Williams, in contravention of Section 3.28(d)(3) of the Commission Rules, and, if so, whether circumstances exist which would warrant a waiver of said Section.

5. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the instant proposals would better provide a fair, efficient and equitable distribution of radio service.

6. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if either, of the instant applications should be granted.

IT IS FURTHER ORDERED, That, American Broadcasting Stations, Inc., and KNOE, Inc., licensees of Stations KWMT and KNOE, respectively, ARE MADE PARTIES to the proceeding.

IT IS FURTHER ORDERED, That, in the event of a grant of the application of James R. Williams, the construction permit shall contain the following conditions:

[R. 83]

"Before program tests are authorized, the permittee shall establish by a non-directional proof-of-performance that the proposed antenna system will provide a minimum efficiency of 175 mv/m/kw."

"This authorization is subject to compliance by permittee with any applicable procedures of the Federal Aviation Agency."

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and parties respondent herein, pursuant to Section 1.140 of the Commission Rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.362(b) of the Commission's Rules, give notice of the hearing, either individually or, if feasible, jointly, within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.362(g) of the Rules.

IT IS FURTHER ORDERED, That, the issues in the above-captioned proceeding may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben W. Waple
Acting Secretary

Released: May 14, 1962

[Rec'd. June 1,1962 - FCC] [R. 88]

PETITION TO ENLARGE ISSUES

Harwell V. Shepard, tr/as Olney Broadcasting Company, by his attorneys, respectfully petitions the Commission to enlarge the issues in this proceeding to include the following:

> To determine whether the program service proposed by James R. Williams was designed to meet the needs of the community to be served and whether, in fact, the proposed programming service will meet those needs.

In support of this motion, it is shown as follows:

1. James R. Williams filed an application for construction permit for a standard broadcast station at Winfield, Kansas on February 9, 1959 (FCC File No. BP-12826). In that application, Mr. Williams proposed to construct and operate a 250 watt, daytime only, broadcast station. He set forth a proposed program schedule, an analysis of the schedule by type of programs, and an analysis of the schedule by source of programs, together with policies on the number and length of spot

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* The hearing issues were published in the Federal Register May 17, 1962.

announcements to be carried and his plans for broadcasts relating to controversial issues. While not required in the Commission's application form, Mr. Williams answered question 3(a) of Section IV of Form 301 which relates to the number and length of spot announcements and commercial continuity carried by an existing station during a prior license period. In order to demonstrate his financial qualifications, Mr. Williams attached a copy of a letter from a bank in Roswell, New Mexico, which purports to extend a line of credit to him in the amount of $12,000.

2. On July 30, 1959, Mr. Williams filed his application for Anadarko, Oklahoma. The Anadarko application was subsequently amended as to frequency and power, so that at present Mr. Williams is also applying for a construction permit for a 250 watt daytime, standard broadcast station at Anadarko, Oklahoma. The Anadarko application contains virtually an exact copy of the programming proposal filed earlier by Mr. Williams, and the same programming was maintained until very recently when part of the programming section of the application was amended by Mr. Williams. The two program schedules were identical. The analyses of the schedules by types of programs were identical. The analyses of the program schedule by sources were almost identical and the differences are so slight as to be meaningless. The policies on the number and length of spot announcements were identical. The policies on broadcasts of public issues were identical. The staffing

[R. 90]

plans were identical except that one additional member of the staff was proposed (an accountant) in the Winfield, Kansas application. The responses to item 3(a) of Section IV in the two applications were identical. The numbers of spot announcements proposed to be carried in the various segments of the broadcast day were identical. The same line of credit was incorporated by reference in each application with the notation that in the event one of the applications was granted additional credit would be secured to support the other application.

3. Shortly before the instant application of Mr. Williams for Anadarko, Oklahoma was designated for hearing, part of the programming proposal was amended. A new proposed program schedule was filed and new analyses of the program schedules by type and source were filed. The remainder of the application, including the policy on discussion of public issues, policy on spot announcements, staffing, and so forth, remained as filed originally by Mr. Williams.

4. The proposed new program schedule indicates that the service of the proposed station at Anadarko will be confined entirely to news and entertainment, Monday through Friday, with the exception of a 15-minute agricultural program at 12:30 p.m. The only educational program proposed in the application as recently amended is a 15-minute program on Saturday afternoon.

5. Mr. Williams is not a resident of Anadarko, Oklahoma, and for that matter, he is not a resident of Winfield, Kansas. His mailing address is Joplin, Missouri, and the most recent information

[R. 91]

available in his application indicates that he resides in Joplin, Missouri.

6. The facts and other matters set forth above are contained in the Commission's files, and official notice thereof is requested.

7. In view of the facts alleged above, it is clear that the applicant copied his Winfield, Kansas proposal of February 9, 1959 when he submitted the instant application for Anadarko, Oklahoma on July 30, 1959. Furthermore, it is apparent that the changes in the programming proposed recently by Mr. Williams have not altered the basic character of the service which he intends to offer and have not changed in any respect his policies on spot announcements and public issues as set forth in the application.

8. Under the circumstances it is clear that the issues in this proceeding must be enlarged to permit inquiry into the nature and extent of Mr. Williams' survey of the program tastes, needs and desires of Anadarko, Oklahoma. Accordingly, we respectfully urge the Commission to enlarge the issues in the manner set forth above. Report on Programming, July 29, 1960, 20 Pike & Fischer RR 1901;

Suburban Broadcasters v. Federal Communications Commission, _____U.S. App. D.C._____(1962).

Respectfully submitted,

Harwell V. Shepard tr/as Olney Broadcasting Company

By: Haley, Bader & Potts

/s/ Andrew G. Haley

/s/ Michael H. Bader

1735 DeSales Street, N.W.
Washington 6, D. C.

June 1, 1962

His Attorneys

[Rec'd. June 14,1962-FCC] [R. 99]

OPPOSITION TO PETITION TO ENLARGE ISSUES

James R. Williams, by his attorneys, herewith submits his opposition to the petition to enlarge issues filed on June 1, 1962 by Harwell V. Shepard, tr/as Olney Broadcasting Company, wherein Shepard requests that a so-called "Suburban Issue" be added against the application of Williams. The Shepard petition should be denied.

1. In the Suburban case, Suburban Broadcasters v. Federal Communications Commission, _____U.S. App. D.C._____, 23 RR 2016 (1962), none of the principals of Suburban, an applicant for new station at Elizabeth, New Jersey, was a resident of Elizabeth. Suburban made no inquiry into the characteristics or programming needs of Elizabeth, and offered no evidence thereon. Suburban's program proposals were identical with those submitted in its application for an FM facility in Berwyn, Illinois, and in an application of two of its principals for an FM facility in Alameda, California.

2. In the instant proceeding the facts are vastly different. As indicated by the attached affidavit of James R. Williams, which is incorporated herein, Mr. Williams has considerable broadcast experience, from which he formulated ideas as to his own policies for programming and general station administration. Mr. Williams filed an application for construction permit for new standard broadcast station at Winfield,

[R. 100]

Kansas on February 9, 1959. When Mr. Williams filed his application for Anadarko on July 30, 1959, he relied to a great degree upon the programming proposal which was submitted in his Winfield application, believing that this programming policy represented only a skeleton outline of the programming to be furnished to Anadarko. Mr. Williams' affidavit further states that on February 5, 1962, more than three months before his Anadarko application was designated for hearing on May 9, 1962, he made a programming survey of Anadarko, consulting with several civic and community leaders. This survey resulted in an amendment to the Williams application which was filed on March 5, 1962, more than two months before Williams' application was designated for hearing. On April 16, 1962, more than three weeks before the Williams application was designated for hearing, he again made a programming survey of Anadarko, at which time he showed his programming proposal to several civic and community leaders who expressed their approval thereof. Mr. Williams did not make any changes in the proposal after his April 16th, survey. The affidavit shows that Mr. Williams will continue to make surveys of the area to meet the needs and tastes of the Anadarko area.

3. It is obvious that a "Suburban" issue should not be added in view of the diligent efforts of Williams to investigate the needs of the Anadarko area and his intention to continue such a survey, as indicated

by a recent Memorandum Opinion and Order in which Commission, WSTE-TV, Inc., File No. BMPCT - 5678, FCC 62-583, released June 1, 1962, stated as follows:

> "13 We do not believe that the circumstances presented here warrant the type of attack which has been made on the applicant's program proposal. It appears from the pleadings filed in this proceeding that the applicant made a proposal in its .....application in good faith but that, mindful of its duties and obligations as a Commission permittee, it has since engaged in continuing efforts to ascertain the needs and interests of its service area. We do not criticize such an approach. Far from being a

[R. 101]

> situation such as Suburban, where the applicant failed to make any efforts to ascertain the needs of the community or meet such needs, we are here faced with an applicant cognizant of its responsibility to continue its efforts to provide a better program service to the public. The fact that this continuing effort has not as yet, led to a change in the applicant's proposal does not detract from the applicant's stated recognition of the obligations it incurs by making a specific program proposal. Thus, the applicant has stated that though it is, itself, dissatisfied with its program proposal, the proposal is one which it can meet in its performance. Accordingly, before changing this proposal (which has already been approved by the Commission), the applicant wished to advance further its continuing study of the area. This attitude of the applicant is completely consistent with our concept of a broadcast licensee's role in continually

stowing to ascertain and serve the needs and interests of the service area. Report and Statement of Policy re: Commission En Banc Programming Inquiry, 20 RR 1901, 1912."

4. There is absolutely no reason for adding a "Suburban" issue against the Williams application because, as already stated, Mr. Williams is aware of his responsibilities as a licensee; he has not been oblivious to the programming needs of the Anadarko area but rather has made and will continue to make diligent surveys of such needs and will make such changes as are in his judgement appropriate.

WHEREFORE, the foregoing considered, it is respectfully requested that the Commission deny the Petition to Enlarge Issues filed by Harwell V. Shepard, tr/as Olney Broadcasting Company, on June 1, 1962.

Respectfully submitted

JAMES R. WILLIAMS
By /s/ Robert M. Booth, Jr.
By /s/ Joseph F. Hennessey
His Attorneys

June 14, 1962

1735 De Sales Street, N.W.
Washington 6, D. C.

[R. 102]

AFFIDAVIT OF
JAMES R. WILLIAMS

My name is James R. Williams. I am the applicant for a construction permit for a new standard broadcast station to be located at Anadarko, Oklahoma (File No. BP-13635; Docket No. 14640). My application was designated for consolidated hearing with the mutually

exclusive application of Harwell V. Shepard, tr/as Olney Broadcasting Company for Olney, Texas (File No. BP-10494; Docket No. 14639). I am also an applicant for construction permit for a new standard broadcast station to be located at Winfield, Kansas (File No. BP-12826).

I am presently employed at Radio Stations KODE-AM and KODE-TV, Joplin Missouri. I have held this position for nearly four years. Prior to this time I was employed at Radio Stations KSWS-AM and KSWS-TV, Roswell, New Mexico. Prior to this time I was employed by the Arkansas Forestry Commission as a Radio Technician. During this time I was employed on a part-time basis at KBTA, Batesville, Arkansas. All told, I have had twenty-two years experience in broadcasting. While most of my functions have been of an engineering

[R. 103]

nature, I feel that over these twenty-two years, I have picked up more than a fair amount of knowledge about programming operation and general administration of a broadcast station.

I put together the programming and staffing proposal for my application at Winfield, Kansas which was filed at the Federal Communications Commission on February 9, 1959. I felt that with my broadcast experience I was qualified to prepare a skeleton outline of a programming proposal designed to meet the needs of the Winfield area. When I filled my application for Anadarko, Oklahoma, on July 30, 1959, I relied to a great degree upon the programming and staffing proposal which was put in Winfield application.

On February 5, 1962, I visited Anadarko, Oklahoma. I discussed programming needs with several people regarded to be business and civic leaders in Anadarko, among who were the following:

NAME	TITLE OR BUSINESS	ADDRESS
Sam Wall	City Manager	City Hall Anadarko, Oklahoma
John Stalder	Cashier	Anadarko Bank and Trust Company Anadarko, Oklahoma

[R. 104]

NAME	TITLE OR BUSINESS	ADDRESS
Neil Dikeman	President First State Bank	First State Bank Anadarko, Oklahoma
John Youngheim	President, Chamber of Commerce	Anadarko, Oklahoma
Carl West	Owner, West Hardware and Furniture Store	Anadarko, Oklahoma
William J. Pitner	Director, Indian Affairs Anadarko Area	Bureau of Indian Affairs U.S. Indian Agency Anadarko, Oklahoma
Leon Carver	President Anadarko Industries, Inc.	Anadarko, Oklahoma

After considering these programming contacts in Anadarko, I decided to alter my programming proposal. I made a reanalysis of my proposed programming by type and source. I reconsidered the policy which had been proposed for Anadarko on discussion of public issues, policy on spot announcements, staffing, and decided that no change was necessary. Subsequently I prepared an amendment to the programming proposal of my Anadarko application, which amendment was filed on March 5, 1962.

On April 16, 1962, I took my proposed program schedule to Anadarko, where I made another programming survey of persons considered

[R. 105]

to be business and civic leaders in Anadarko. Among the persons who were contacted were the following:

NAME	TITLE OR BUSINESS	ADDRESS
Hon. Troy H. Massey	Judge	128 1/2 West Broadway Anadarko, Oklahoma
Clifford Wall	Manager, Roberds and Wall, T V Service	Anadarko, Oklahoma
Bill Watson	National Director Junior Chamber of Commerce	Anadarko, Oklahoma
Rev. Wayne Douglas	Minister	First Methodist Church 202 West Oklahoma Anadarko, Oklahoma
Rev. Frank H. Loveless	Minister	First Baptist Church 301 West Broadway Anadarko, Oklahoma
Rev. Edward Bok	Priest	St. Patrick's Catholic Mission Church and School Anadarko, Oklahoma
Harold R. Liles	County Agent	Caddo County Courthouse Anadarko, Oklahoma
George H. Tidmore	County School Superintendent	Caddo County Courthouse Anadarko, Oklahoma
B. F. Johnson	City School Superintendent	Anadarko, Oklahoma
A. T. Pyles	School Superintendent	Riverside Indian School Anadarko, Oklahoma

[R. 106]

I showed each of these people my programming proposal and solicited their suggestions. Each of them approved the schedule and some discussions were held as to scheduling of special programs which might be carried after the station begins operating.

If my application for construction permit for Anadarko is granted, I feel that I may have to make such changes in the programming of my station as are in my opinion necessary to best meet the needs and tastes of Anadarko and are consistent with sound business practice. I will continue to make surveys of the area. I feel that the proposed policy as to programming is only a skeleton outline and that there could and should be flexibility within this broad outline to meet the specific needs of the community.

/s/ James R. Williams

[JURAT the 11th day of June, 1962.]
[Notarial Seal]

B
FCC 62-829
22337

MEMORANDUM OPINION AND ORDER

By the Commission:

1. The Commission has before it for consideration a petition to enlarge issues, filed June 1, 1962, by Harwell V. Shepard, tr/as Olney Broadcasting Company, and pleadings properly filed in response thereto.

2. Olney and James R. Williams are applicants for new Class II standard broadcast stations on 540 kc with 250 w at Olney, Texas, and Anadarko, Oklahoma, respectively.

3. Petitioner, pursuant to 47 CFR 1.141, requests addition of an issue to this proceeding, to determine whether the proposed program service of Williams was designed for and would serve his service area. In support of the request petitioner asserts that William's proposed programming schedule for his instant application, as originally filed, was

virtually an exact copy of the one Williams filed with his application for a 250 w station at Winfield, Kansas. Petitioner shows that Williams subsequently amended his Anadarko application two months prior to its designation for hearing, revising his program proposals, but asserts that the revised programming remains identical with that for Winfield in such categories as "dicussion of public issues," "policy on spot announcements", "staffing"; and as to the revised parts, asserts that they show only 15 minutes daily of agriculture, and 15 minutes on Saturday for education. Petitioner also asserts that Williams is not a resident of Anadarko.

4. Williams' opposition, supported by his affidavit, states that the initial proposed programming was based upon his past broadcast experience and was intended merely as a skeleton outline. Williams shows that three months prior to designation of the instant proceeding for hearing he discussed potential programming with numerous Anadarko civic leaders;

[R. 115]

that as a result of such interviews, he changed his programming and returned to Anadarko, prior to the designation of this proceeding, and discussed his amended programming with other community leaders; that on these visits, he sought out the counsel of these local leaders concerning specific programs; and that he will continue to change his programming to suit the tastes of his area.

5. The Broadcast Bureau also opposes the petition, pointing out that an applicant may amend his application as a matter of right at any time prior to designation, and that, therefore, only Williams' amended programming should be under consideration. Considering those factors cited by petitioner in paragraph 3, supra, as unchanged from Williams' proposal for Winfield, the Bureau asserts that such similarities are inevitable where an applicant proposes such broadcast operations.

6. It is the amended programming proposal that we are concerned with, and it has been shown that the programming proposal as amended by right, pursuant to 47 CFR 1.311(a), is not a duplicate of that for Winfield. Furthermore, the instant proposal was made, as is shown by

uncontroverted affidavit, after a survey of community needs and it is represented that such surveys will continue. An issue, such as is requested here, where the applicant is engaging in a continuing effort to ascertain the needs and interests of its area, is not justified, WSTE-TV, Inc., FCC 62-583 (1962). Therefore the request will be denied.

7. In its reply to the oppositions, petitioner requests that the Commission add a good faith issue, asserting that Williams, by filing his application prior to making specific inquiries in the proposed service area, did not file his application in good faith. This is an insufficient factual basis for so enlarging. While failure to specifically survey community needs prior to the filing of an application, may, in conjunction with other factual matters, tend to show that application was filed for the purpose of impeding the grant of another application, it is not in and of itself, sufficient to justify an issue as to good faith.

ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues, filed June 1, 1962,and the request to add an issue included in a pleading filed June 21, 1962, by Harwell V. Shepard tr/as Olney Broadcasting Company, ARE DENIED.

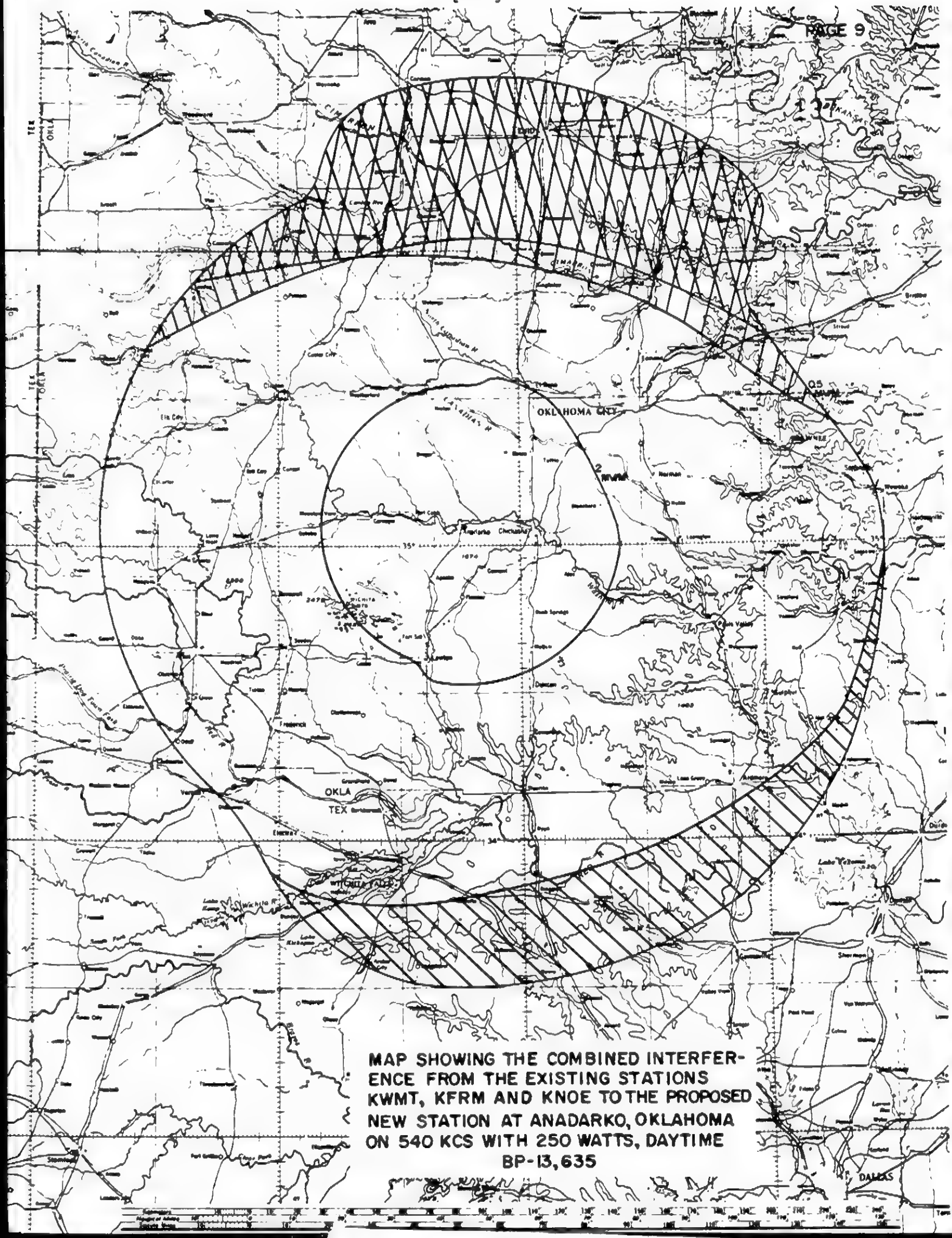
FEDERAL COMMUNICATIONS
COMMISSION

[Seal]

/s/ Ben F. Waple
Acting Secretary

Adopted: July 25, 1962
Released: July 27, 1962

[137]



MAP SHOWING THE COMBINED INTERFERENCE FROM THE EXISTING STATIONS KWMT, KFRM AND KNOE TO THE PROPOSED NEW STATION AT ANADARKO, OKLAHOMA ON 540 KCS WITH 250 WATTS, DAYTIME
BP-13,635

[R. 141]

STATEMENT OF AREAS AND POPULATIONS WHICH WILL GAIN OR LOSE PRIMARY SERVICE FROM THE PROPOSED OPERATION AT ANADARKO, OKLAHOMA ON 540 KCS WITH 250 WATTS-D BP-13,635

	CONTOUR (mv/m)	AREA (sq. mi.)	POPULATION
1.	2.0	3,848	170,673
2.	0.5	29,105	448,544
3.	Interference from KNOE	2,692	22,130
4.	Interference from KWMT	4,630	50,634
5.	Additional Interference from KFRM	207	1,018
6.	Total Interference	7,529	73,772 (16.4%)
7.	Interference-free Contour	21,576	374,772
8.	KWMT 0.5	85,570	2,291,781
9.	Interference from KSD	1,229	21,076
10.	Interference from BP-13,635	2,762	52,829 (2.3%)
11.	Total Interference	3,991	73,905 (3.2%)
12.	KNOE 0.5	41,827	1,114,265
13.	Interference from BP-13,635	230	6,158 (0.6%)

Note: For Method and Basis of Determining Areas and Populations, See Appendix A and B

[R. 171]

21-A

[R. 171]

WILLIAMS EXHIBIT NO. 5
Docket No. 14640
Page 1

Indian Tribes of Western Oklahoma

1. There are 37 organized tribes located within the boundary of Oklahoma today. These tribes are under the jurisdiction of several Area Field Offices or Agencies, which in turn are under one of two Area Offices. One Area Office is located at Muskogee, Oklahoma, and serves the eastern side of the state. The other Area Office is located at Anadarko, Oklahoma, and serves the tribes of the Western part of the state. There are 24 tribes of Indians under the jurisdiction of the Anadarko Area Office.

2. Actually, there are no longer any reservations in Oklahoma since practically all reservation land once held in common has been allotted to individual members, this having been done around the turn of the century. Indians or their descendants still live on these allotments, which vary in size from 40 acre to 160 acre tracts; many of the original allotments have been eliminated from Indian ownership through sales by the Indian owners. Generally, income is derived from these lands either by the Indian farming the land himself or leasing the land to other farmers and collecting income through crop shares or land rental. In several of the tribes, there are members who are more fortunate than others in that oil and gas have been found on their land holdings. The royalties from these natural resources have made these members financially independent.

3. The older members of the tribes have clung to most of the old Indian customs and today Indian dances and various ceremonies are still held and attended by many of the tribes and their members. The younger members of the tribes have more or less adopted the modern mode of living and have become educated, many to the extent that they now hold responsible positions in private industry or government service.

4. The religious beliefs of the tribes are varied. Several denominations have established missions or churches in the various

[R. 172]

Indian settlements and to these the Indian people usually belong. Some of these churches may have ministers presiding who are of Indian extraction. In some of these churches, one finds that the singing and sermons are done in the Indian language. With but very few exceptions, the Indians of Oklahoma can understand and do speak the English language as well as their own tribal dialect. Of a total number of 36,877 Indians under the guidance of Anadarko Area Office, 21,161 still live on the former allotment.

5. Comanche Indian Tribe - The Comanche Indian Tribe is of the Shoshonian linguistic group which also includes the Showshone, Bannock, Ute, and Piute Indian tribes. These tribes were originally of the Rocky Mountain area and the Comanches were the only tribe to leave their native haunt and establish themselves on the plains. Comanche legends which have been passed down from generations show that they were the first Indian group to acquire horses from the Spaniards. The horse made quite a change in the mode of living for the Comanche in that he became nomadic and moved around a lot. The Comanche were known to be the most skillful horsemen in the West and was also noted for his courage in battle. The Comanche were traditionally hunters and their diet consisted of wild meat, berries and edible roots. After the Comanche left the mountains for the plains, they subsisted mainly on buffalo meat and used the skins for clothing, bedding, and shelter.

6. Several treaties were consummated between the United States and the Comanche tribe between 1834 and 1875. The Comanches, together with the Kiowa and Apaches, were allotted 160 acres of land each in southern Oklahoma. They live around the Lawton, Oklahoma area today, some farming, raising stock, and others holding positions in private industry or the Government Service. There is an estimated number of 3,000 Comanches today, with the majority of that number being full-blooded members.

7. Caddo Tribe - The Caddo Indian Tribe belongs to the Caddo linguistic family and the present Caddo tribe also includes remnants of

FCC 63D-63
36353

Appearances

Robert M. Booth, Jr., Esq., and Joseph F. Hennessey, Esq., for James R. Williams; Andrew G. Haley, Esq., and Michael Bader, Esq., for Harwell V. Shepard, tr/as Olney Broadcasting Company; Marcus Cohn, Esq., and Roy F. Perkins, Jr., Esq., for KNOE, Inc., and Walter M. Strick, Esq., for Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER
JAY A. KYLE

Preliminary Statement

1. This proceeding involves the application of James R. Williams for a construction permit for a new Class II standard broadcast station to operate on 540 kilocycles, daytime only, with a power of 250 watts, at Anadarko, Oklahoma. Originally Harwell V. Shepard, tr/as Olney Broadcasting Company (Olney) was an applicant for the same facilities at Olney, Texas. The Review Board dismissed the application of Olney by Memorandum Opinion and Order released April 24, 1963 (FCC 63R-207).

2. The Commission through an order released May 14, 1962 (FCC 62-506) found both Williams and Olney to be legally, technically, financially, and otherwise qualified to operate the proposed stations, except as indicated in the specified issues, which are as follows:

1. To determine the areas and populations which would receive primary service from the instant proposals and the availability of other primary service to such areas and populations.

2. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and the interference that each of the instant proposals would receive from all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
3. To determine whether the instant proposal of James R. Williams would cause objectionable interference to Stations KWMT, Ft. Dodge, Iowa and KNOE, Monroe, Louisiana, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
4. To determine whether interference received from existing stations would affect more than ten percent of the population within the normally protected primary service area of the instant proposal of James R. Williams, in contravention of Section 3.28(d)(3) of the Commission Rules, [See Appendix] and, if so, whether circumstances exist which would warrant a waiver of said Section.
5. To determine, in the light of Section 307(b) [See Appendix] of the Communications Act of 1934, as amended, which of the instant proposals would better provide a fair, efficient and equitable distribution of radio service.
6. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if either, of the instant applications should be granted.

3. The Commission also made as parties to this proceeding American Broadcasting Stations, Inc., and KNOE, Inc., licensees of Stations KWMT and KNOE, respectively. By Memorandum Opinion and Order released July 27, 1962 (FCC 62-828) the Commission's order of designation was amended by adding the following issue:

> To determine whether a grant of the application of Harwell V. Shepard tr/as Olney Broadcasting Company, for a new standard broadcast station at Olney, Texas, would be in contravention of Section 3.35 of the Commission's Rules.

On the same date, the Commission denied a request by Olney for enlargement of issues to include the so-called "Suburban Issue" against Williams.

4. A prehearing conference was held on June 22, 1962, at which appearances were entered on behalf of Williams, Olney, KNOE and the Commission's Broadcast Bureau. Counsel for KWMT did not appear at this conference, nor did he subsequently participate in this proceeding. Hearings were held on November 26, 1962, December 20, 1962 and May 2, 1963. On the latter date the record was closed. Proposed findings of fact and conclusions of law were filed by Williams on May 16, 1963, and by the Broadcast Bureau on May 22, 1963. Replies were filed on behalf of Williams on May 28, 1963.

Findings of Fact

5. James R. Williams seeks a construction permit for a new Class II standard broadcast station to operate on 540 kilocycles, daytime only, with a power of 250 watts, at Anadarko, Oklahoma.

6. Anadarko is a city with a population of 6,299 according to the 1960 United States Census. It is the county seat of Caddo County, which has a population of 28,621. Anadarko is located in southwestern Oklahoma and is approximately 66 miles southwest of Oklahoma City, the State Capital, on United States Highways 66 and 281, and State Highways 8 and 9. Anadarko has a Mayor and Council, who are elected for

two-year terms. The administrative affairs of the city are managed by a City Manager. The appropriations for the general fund of Anadarko for the year 1961-1962 totalled $325,150.37, while the figures for the following year were $370,186.98.

7. Anadarko and its environs are replete with Indian history and culture. It is known as "The Indian Capital of the Nation," and

[R. 239]

was named for a band of Indians. In 1859 the first Indian Agency was temporarily established southeast of Anadarko and in 1871 after being destroyed by a band of marauding Indians, it was relocated on the Washita River about one and one-half miles north of Anadarko. In 1878 another Agency was consolidated with the Agency at Anadarko and moved south to Washita to the present site of Old Town in Anadarko, where the Agency remained until 1935 when it was moved to the Federal Building in Anadarko.

8. In 1948 the Federal Government began the stablishment of Area Indian Offices, with eleven such offices placed at strategic points in the United States. One of these offices is the Anadarko Agency, which has four sub-agencies under it in western Oklahoma, serving 40,000 Indians and all the tribes in that part of the state. Anadarko is the site of the Annual Indian Exposition which has been held in the city for 31 years. Approximately 40,000 tourists attended the 1962 Exposition, which featured Indian arts and crafts, sports, dances, parades and pageants. The Riverside Indian School, located one mile north of Anadarko, dates back to 1871. Located two miles south of Anadarko is Indian City, USA, which is an outdoor museum designed to preserve as much as possible of the way of life of the Southern Plains Indians of a hundred years ago. At the present time, Indian Village, USA, includes six different tribal villages, chosen to represent as wide a variation as possible of cultures among the Plains Indians. The site was once part of the larger Kiowa, Comanche and Apache reservation, and is in the Tonkawa Hills near the site of the massacre of the Tonkawa Indians by a band of the Shawnees and other mercenaries during the Civil War.

9. There are no standard broadcast or television stations in either Anadarko or Caddo County. There are two newspapers published in Anadarko; one a daily with a circulation of 4,020 and a weekly with a circulation of 525. Anadarko has approximately 250 retail business establishments, 24 religious, civic, social and fraternal organizations and 17 churches of various denominations. In addition to the foregoing, Anadarko has the usual array of both city and county offices, being the county seat. In addition to two offices of the State of Oklahoma, there are 15 offices of the Federal Government, including the Indian Affairs Offices.

10. Based on the proposed radiation of 87.5 mv/m and ground conductivity given in Figure M-3 of the Rules for the area, the proposed station at Anadarko is expected to achieve the following coverage:

[R. 240]

Contour	Area (sq. mi.)	Population
2.0	3,848	170,673
0.5	29,105	448,544
Interference from KNOE, KWMT, and KFRM	7,529	73,772
Interference-free	21,576	374,772

The foregoing table shows that the proposed station will receive interference from existing stations which will preclude primary service to 73,772 persons in 7,529 square miles, representing 16.4 percent of the population and 25.8 percent of the area within the normally protected 0.5 mv/m contour.

11. The area wherein the proposed station would provide a primary service (as limited by existing interference) reaches approximately 63 miles to the north, 98 miles to the east, and 85 miles to the south and west of Anadarko. A small segment of the southern portion of the proposed service area lies in the adjoining State of Texas. The proposed 2 mv/m contour falls at distances from Anadarko varying from 33 miles to 36 miles and includes the cities of Chickasha, Oklahoma, (pop. 14,866) about 15 miles to the east and Lawton, Oklahoma, (pop. 61,697) some 32 miles generally to the south. All urban communities of 2,500 persons or more

which would be served by the proposed station presently receive primary service (2 mv/m or greater) from at least five stations. All rural parts that would be served now enjoy at least 14 services and some parts have as many as 22 services. A large number of these stations which render service are located within the proposed service area as limited by interference.

12. Anadarko receives primary service (at least 2 mv/m) from six stations. These stations and their distances from Anadarko are set forth in the following table:

Station	Frequency	Daytime Power	Distance from Anadarko
KWCO, Chickasha, Okla.	1560 kc/s	1 Kw	18 miles
KSWO, Lawton, Okla.	1380 kc/s	1 Kw	34 miles
WNAD, Norman, Okla.	640 kc/s	1 Kw	47 miles
WKY, Oklahoma City, Okla.	930 kc/s	5 Kw	50 miles
KOMA, Oklahoma City, Okla.	1520 kc/s	50 Kw	50 miles
KWFT, Wichita Falls, Tex.	620 kc/s	5 Kw	82 miles

(The mileage figures submitted by the Broadcast Bureau vary slightly in certain instances).

[R. 241]

13. The proposed station at Anadarko would cause interference to co-channel stations KWMT, Fort Dodge, Iowa (540 kc/s, 5 Kw, DA-D) and KNOE, Monroe, Louisiana (540 kc/s, 5 Kw-D/1 Kw-N). The proposed interference to KNOE would affect 6,158 persons in an area of 230 square miles. Since the 0.5 mv/m contour of KNOE includes an area of 41,827 square miles with 1,114,265 residents, the population loss to KNOE is 0.6 percent. The population losing the service of KNOE would continue to receive at least 12 services from four Shreveport stations and combinations of Texas stations at Dallas, Longview, Marshall, and Henderson. The interference area is more than 120 miles from KNOE but most of it is only 40 miles from Shreveport, Louisiana.

14. The proposed interference to KWMT would fall in the southwestern extremity of the station's service area where it penetrates the northeastern corner of Kansas. All of the area of 2,762 square miles that would

lose the service of KWMT is more than 200 miles from Fort Dodge, Iowa. Most of the interference area is within 70 miles of Topeka, Kansas, and the remainder is within 30 miles of Beatrice, Nebraska. Station KWMT already receives interference KSD in the northeastern corner of Missouri from near Macon, Missouri, to the vicinity of Keokuk, Iowa, involving an area of 1,229 square miles which is more than 200 miles from Fort Dodge. Data as to the population and area affected are given in the following table:

	Area (sq. mi.)	Population
0.5 mv/m (normally protected)	85,570	2,291,781
Interference from KSD	1,229	21,076
Interference from Anadarko	2,762	52,829 (2.3%)
Total Interference	3,991	73,905 (3.2%)
Interference-free	81,579	2,217,876

The 52,829 persons who would lose the service of KWMT if the proposal were to be granted would continue to receive at least 12 other services as provided by eight stations serving the entire interference area in combination with 16 other stations serving parts of the area.

15. There is evidence that there has been no programming of interest to the Indians from Anadarko; no broadcasts have been made of high school football or basketball games, American Legion baseball league games, or of performances of tribal songs and music lectures concerning Indian culture. In addition the Caddo County Agricultural Agent stated that he has had difficulty in disseminating agricultural information in Caddo County because he never had access to radio

[R. 242]

facilities for such purposes. Another witness stated that he had been a State Highway patrolman in Anadarko and Caddo County and that he incurred problems in the past in advising the people of Anadarko of changes in the road conditions, such as closings or reroutings due to winter weather and storms, fires, disasters, and other such emergency situations. This witness said he knew of no instance when such information had been

carried over a radio station for the benefit of Caddo County. Still another witness who had lived there for 32 years, and was manager of a retail business in Anadarko, stated that he had no access to a local radio station for advertising purposes.

Conclusions

1. The application of James R. Williams for a construction permit for a new Class II standard broadcast station to operate on 540 kilocycles daytime only, with a power of 250 watts, at Anadarko, Oklahoma, would provide the first transmission facilities to Anadarko, which is the county seat of Caddo County. It would bring a new service to 374,772 persons in an area of 21,576 sq. mi. Anadarko now has available six primary services from stations ranging from 18 miles to 82 miles distance, which will be hereinafter discussed in paragraphs 15, 16 and 17, infra.

2. Anadarko is known as "The Indian Capital of the Nation." It has a population of 6,299, while Caddo County's population is 28,621. Anadarko is located in southwestern Oklahoma and is approximately 66 miles southwest of Oklahoma City, the State capital. The city has two newspapers, one published daily with a circulation of 4,020, and a weekly with a circulation of 525, but as heretofore related, neither the city nor the county has a radio facility or television station. Anadarko and Caddo County are rich in Indian lore. In order not to be repetitious, in the findings of fact, paragraphs 7 and 8 give a brief resume of the activity of Indian Affairs in this community extending from 1859 to date. Being the county seat, the county offices, as well as the city offices are located in Anadarko, and in addition thereto, there are two offices of the State of Oklahoma, besides 15 offices of the Federal Government. There are about 250 retail business establishments, 24 religious, civic, social and fraternal organizations and 17 churches of various denominations.

3. Because of interference received from three existing stations the proposed station would fail to serve 16.4 percent (73,772 persons) of the population within its normally protected contour. This

population loss exceeds the maximum of 10 percent allowed by Section 3.28(d)(3) of the Rules.

4. Additionally, the Williams proposal would result in co-channel interference losses to two existing stations, KWMT and KNOE, affecting 52,829 and 6,158 persons, respectively. Compared to the populations within the normally protected contours of the two stations the population losses represent 0.6 percent in the case of KNOE and 2.3 percent in the case of KWMT. With regard to the latter station, the proposed new interference would raise the total population loss to 3.2 percent. The remaining service populations available to KNOE and KWMT exceed one million persons. Both interference loss areas receive service from at least 12 other existing stations. Neither station has protested a grant of the Williams' application.

5. Standing alone, it is clear that the need of a first transmission facility in Anadarko outweighs the need for the service to be lost by KNOE and KWMT. However, since the proposal contravenes Section 3.28(d)(3) of the Rules, the so-called "10 Percent Rule," it must be determined whether circumstances exist which would warrant a waiver of said Rule.

6. The Commission has not set up any pattern to make a determination whether a waiver of the 10 percent Rule would be justified in any given case. The situation here is simply whether an area consisting of a town embracing 6,299 persons in a county of 28,621 in southwestern Oklahoma should have its first radio outlet despite the recognized interference involved.

7. The United States Court of Appeals for the District of Columbia said in Beaumont Broadcasting Corp. v. Federal Commun. Com'n., 202 F.2d 306 (1952) that:

> "As for the ten percent rule itself, the Commission has long recognized that it specifies only a norm, not a hard and fast rule. Both in authorizing and refusing to authorize departures from the ten percent Standard, the Commission has frequently stated that the governing criterion is the public interest." l.c. 310.

8. The Commission in referring to Section 3.28(c) [Now 3.28(d)(3)] of the Commission's Rules in Reilly and Spates, 24 F.C.C. 257, 14 RR 985, (1958) held that waivers of said rule are determined on a case-to-case basis and in each instance when a waiver has been requested, it is necessary to determine whether special circumstances exist to justify deviation from the Rules.

[R. 244]

9. In a proceeding decided in 1958, involving the grant to a city which would have its first local transmission service, the Commission in Southern Indiana Broadcasters, Inc., 24 F.C.C. 521, 15 RR 349, stated in part:

> "A grant to Lawrenceville will give a first local transmission service to more people and would bring an additional reception service to a substantial number of people who now are limited to one or two primary services. The use which this applicant would make of the frequency would better achieve the purposes which regional facilities are expected to attain even though in other respects its operation would be less efficient than Southern's as evidenced by Lawrenceville's violation of the 10 percent rule. Southern would bring a new primary service to a greater number of people than Lawrenceville, but this advantage loses some of its significance because of the availability of other services, particularly in Evansville." l.c. 533.

See also Dorsey Eugene Newman, 12 RR 211 (1956).

10. It should be observed here that Southern Indiana has a striking resemblance to the matter here under consideration. In that case, the Commission granted a waiver of the 10 percent rule for a proposal of a first station in Lawrenceville, Illinois, despite the fact that the Lawrenceville station would receive 17.1 percent interference within its normally protected contour. In the proposed operation at Anadarko, its first station would receive only 16.4 percent within its normally protected contour. The population of Lawrenceville was only 29 persons more than

in Anadarko. Lawrenceville had 6,328 and Anadarko has 6,299. Both Lawrenceville and Anadarko are county seats of their respective counties. However, in the case of Caddo County, Oklahoma, the population is 28,621; whereas, in the case of Lawrence County, Illinois, of which Lawrenceville is the county seat, has a population of only 20,539.

11. Later, in Interstate Broadcasting Co. v. F.C.C., 265 F.2d 598 (1959) the Court in referring to the 10 percent rule, said in part:

> "Appellant next insists that the Commission is rigidly bound by the provisions of its Rule 3.28(c), [now 3.28(d)(3)] [10 percent rule]. This rule clearly contemplates that a §307(b) finding may be made under prescribed circumstances, including as here pertinent a showing of compliance

[R. 245]

> with the "10% rule," and that "25 percent or more of the nighttime primary service area of the proposed station is without primary nighttime service." Appellant would have us say as a matter of law that failure in such respects is an absolute bar to a grant. In this view, it is argued that the application should have been denied outright, without more. Thus appellant would convert a mere gauge established by rule into a straight-jacket, precluding all further action. This simply is not the law, as we have previously stated." l.c. 601.

12. The case of Louis Adelman, 28 FCC 432, 18 RR 97 (1960) is not in point. There the Commission reversed the Hearing Examiner who had relied upon Southern Indiana. The Commission stated that the proposed daytime operation there would receive objectionable interference affecting 22.5 percent of the population and would be the deepest encroachment upon the 10 percent rule. That situation does not prevail here.

13. Charles J. Lanphier, 31 FCC 212, 20 RR 282 (1961) is not controlling here. The facts there and those present bear no degree of

resemblance. In Charles J. Lanphier two of the communities involved were both suburbs of Minneapolis and a part of the Minneapolis-St. Paul urbanized area. The third community was in the State of Iowa.

14. Another pronouncement by the Commission relative to the possibility of interference in excess of 10 percent within its normally protected 0.5 mv/m contour and where the proposal would accord to a city its first local facility is by a Memorandum Opinion and Order in Hammonton Broadcasting Company, ____ FCC ____, 21 RR 199 (1961) wherein it is stated:

> "Moreover, assuming arguendo that the Hammonton application did receive in excess of 10 percent interference within its normally protected 0.5 mv/m contour, we are nevertheless, of the view that the grant of this proposal would be in the public interest, especially since it provides a first local facility to the City of Hammonton, New Jersey." l.c. 206.

15. The case of Star of The Plains Broadcasting Company v. F.C.C., 267 F.2d 629 (1959) involved the town of Slaton, Texas, with a population (1950) of 5,036 persons, seeking its first radio outlet.

[R. 246]

Slaton is located 16 miles from Lubbock, Texas, with a population of 71,747 persons, which had six radio stations. The Commission denied the Slaton application and the Court reversed. The Court said the Commission in part relied on Slaton's proximity to Lubbock's six stations to find a diminished need for a first local outlet at Slaton. The Court added that:

> "Apparently, the Commission relied upon its expertise * * * and in assuming that whatever Slaton's local needs might be, they would be sufficiently filled by Lubbock's six stations. However, as we said in another context: 'Commission expertise alone cannot support [such] pivotal assumption[s].'" l.c. 632 (citing cases).

16. As heretofore observed, neither Anadarko nor Caddo County has a radio station or television facility. Like Slaton, Texas, in Star of The Plains, supra, it has available six primary services. One of these primary services is 82 miles away in Wichita Falls, Texas. Two of these services are located at Oklahoma City, a distance of 50 miles from Anadarko. At 47 miles from Anadarko is located a Norman, Oklahoma. station. The fifth service is at Lawton, Oklahoma, 34 miles distance. The closest facility to Anadarko is Chickasha, Oklahoma, which is 18 miles. In Star of The Plains, the six services are all located only 16 miles from the community involved. It cannot either be reconciled nor construed that the six primary services available to Anadarko are a satisfactory substitute for a local facility as a means of community self-expression by Anadarko and Caddo County.

17. The Commission treated the subject matter of a first local transmission service and primary service from other communities in Regional Radio Service, 32 FCC 1073, 23 RR 599 (1962) wherein it said in part:

> "While the rendition of a first local transmission service to a community is not an absolute consideration, a strong presumption of need for a proposed service arises therefrom regarding which WMBD offered no rebuttal evidence during the course of the hearing.[4/] Its argument that the presumption in

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"4/ It is well established that a strong presumption of need exists for a first local transmission service. Star of the Plains Broadcasting Co. v. FCC, 105 U.S. App. D.C. 352, 267 F.2d 629 (1959).

> "favor of a first local outlet is of dubious validity and applicacability on the facts in this case, in that (a) the proposed service area now has available at least 10 primary services; (b) 2 of the 4 stations furnishing a primary service to Rantoul are located in communities only 15 miles from

Rantoul, and serve the local needs of Rantoul; and (c) the proposal would cause 12,535 persons residing in an area of 363 square miles to lose service from WMBD is not found to be of sufficient weight to overcome the presumption of need. The fact that applicant's proposed service area now has available at least 10 primary services does not decrease the significance of the presumption in favor of a first local outlet. It is true that need for an additional service lessens with the increase in number of services available within a given area, but the number of services is not necessarily determinative, for each case presents a variety of factors which must be considered collectively in determining what constitutes a fair, efficient, and equitable distribution of radio service. Suburbanaire, Inc., 29 FCC 953, 19 R.R. 1227 (1960). Nor can it be said that the presumption is rebutted by the fact that two stations situated in communities 15 miles from Rantoul provide primary service thereto. It does not follow therefrom that the local needs of Rantoul are met to the extent that a local Rantoul station would meet them. Although it is clear that a station may not ignore any portion of its service area, it is equally clear that because of demands upon its broadcast time from its principal community and other portions of its service area, a nearby station cannot as effectively meet the needs of another community as can a station situated therein. The Commission has held that service rendered to a community from stations located in other communities, commendable as this service may be, is not to be regarded as an adequate substitute for a local station.[5/]" (Emphasis supplied.) l.c. 1075.

"[5/] Miners Broadcasting Service, Inc., 23 FCC 408, 13 R.R. 1163 (1957); Valley Broadcasting Co., 29 FCC 463 (1960), 19 R.R. 231; Nick J. Chaconas, 29 FCC 1226 (1960), 19 R.R. 100."

18. Old Belt Broadcasting Corp., 30 FCC 1067, 20 RR 1035 (1961) is an analogous case. In that proceeding Old Belt Broadcasting Corporation and Patrick Henry Broadcasting Corporation, licensees of Class III, daytime stations WJWS and WHEE, operating nondirectionally on 1370 kilocycles, 1 kilowatt power, at South Hill and Martinsville, Virginia, respectively, were seeking construction permits to increase power to 5 kilowatts. Station WJWS would cause interference in the amount of 13.1 percent and WHEE would result in 19.1 percent loss of the population within their normally protected 0.5 mv/m contours. The Commission there said:

> "It is, of course, true that with daytime violations of the 10-percent rule in particular, we grant waivers of the rule only in unusual circumstances in which it is clearly demonstrated that the public interest requires such exceptional action. It (sic) this connection, and in addition to the facts above noted which constitute in our judgment unusual circumstances, it is appropriate to recall that the 10-percent rule was adopted in 1954 because "* * * it represents the most appropriate balance between the competing factors of optimum utilization of available frequencies and protection of existing stations against interference."[3/]" l.c. 1070.

The Commission granted the waiver of the 10 percent rule for the 13.1 percent and 19.1 percent losses of population.

19. The recently decided Inter-Cities Broadcasting Company, 34 FCC 751 (adopted May 1, 1963) is not in point. In that proceeding the Commission had under consideration Livonia, Michigan, a city of 67,000 persons, which was separated from Detroit, Michigan, by Redford Township, the separation varying only from one and one-fourth to two and one-fourth miles from Detroit. Livonia and Detroit are both situated in Wayne County, Michigan. Inter-Cities relied on Southern Indiana. However, the interference at Livonia was 23.5 percent as against 17.1 percent in

Southern Indiana; while it is only 16.4 percent as proposed at Anadarko. The Commission categorically said there:

"3/ Report and order in docket No. 10509, 10 R.R. 1595."

[R. 249]

> "But a much greater deviation is presented here (23.5 percent) than in Southern Indiana (17.1 percent), and other than the first local transmission service aspect the Inter-Cities proposal is dissimilar from Southern Indiana. There the principal community to be served received only two primary services, no standard broadcast station was assigned within the county, and the proposal would bring a second primary service to 12,378 persons. There were found to be substantial reasons for waiving the violation of the 10 percent rule."

20. There is no similarity between Inter-Cities and the proceeding here except for the facet of a first local transmission service. A large suburb of one of the largest cities in the country has no comparability to a small county seat town in either Illinois or Oklahoma. The community of Lawrenceville and Lawrence County in Southern Indiana is distinctly comparable to Anadarko and Caddo County, Oklahoma. The population of Lawrenceville is only 29 more persons than in Anadarko, while Caddo County, Oklahoma, is substantially larger than Lawrence County, Illinois.

21. The public interest will be served through the waiver of Section 3.28(d)(3) of the Commission's Rules in this instance.

22. The grant of this application would be consonant with Section 307(b) of the Communications Act which directs the Commission to:

> "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

It is established that the mandate of this statute requires a fair distribution of facilities for the transmission of radio service as well as reception facilities. Pinellas Broadcasting Co. v. Federal Commun. Com'n., 230 F.2d 204, 207 (1956).

23. In view of the foregoing findings of fact and conclusions and upon consideration of the entire record in this proceeding, it is concluded that a grant of the application of James R. Williams for a construction permit for a new standard broadcast station in Anadarko, Oklahoma, to operate on 540 kilocycles, daytime only, with a power of 250 watts, will serve the public convenience and necessity, conditioned however, upon the following:

[R. 250]

"Before program tests are authorized, the permittee shall establish by a non-directional proof-of-performance that the proposed antenna system will provide a minimum efficiency of 175 mv/m/kw."

"This authorization is subject to compliance by permittee with any applicable procedures of the Federal Aviation Agency."

ACCORDINGLY, IT IS ORDERED, this 3rd day of June 1963, that unless an appeal to the Commission from this Initial Decision is taken by any of the parties or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.153 of the Rules, the application of James R. Williams for a construction permit for a new standard broadcast station in Anadarko, Oklahoma, to operate on 540 kilocycles, daytime only, with a power of 250 watts is granted, conditioned upon the following:

"Before program tests are authorized, the permittee shall establish by a non-directional proof-of-performance that the proposed antenna system will provide a minimum efficiency of 175 mv/m/kw."

"This authorization is subject to compliance by permittee with any applicable procedures of the Federal Aviation Agency."

/s/ Jay A. Kyle
Hearing Examiner
Federal Communications Commission

[Seal]

Released: June 4, 1963
and effective 50 days thereafter, subject to the provisions of the Rule (1.153) cited in the ordering clause above. Exceptions, if any, must be filed within 30 days of the release date unless an extension is duly granted.

[R. 251]

APPENDIX

Section 3.28(d) of the Commission Rules in part reads:

"Upon showing that a need exists, a Class II, III, or IV station may be assigned to a channel available for such class, even though interference will be received within its normally protected contour; Provided: * * * (3) the interference received does not affect more than 10 percent of the population in the proposed station's normally protected primary service area; * * *."

Section 307(b) of the Communications Act of 1934, as amended, reads:

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

FCC 64R-25
45948

Appearances

Robert M. Booth, Jr. and Joseph F. Hennessey, on behalf of James R. Williams; Roy F. Perkins, Jr. and Marcus Cohn (Cohn and Marks), on behalf of KNOE, Inc.; and Joseph Stirmer and Walter M. Strick, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

By the Review Board: Berkemeyer and Slone. Board Member Nelson dissenting and issuing a statement.

1. This proceeding involves the application of James R. Williams (Williams) for a new standard broadcast station at Anadarko, Oklahoma (540 kc, 250 w, daytime only, Class II). By Order (FCC 62-506) released May 14, 1962, Williams' application was designated for consolidated hearing with the application of Harwell V. Shepard, tr/as Olney Broadcasting Company (Olney). The Review Board dismissed the Olney application by Memorandum Opinion and Order (FCC 63R-207) released April 24, 1963. The remaining relevant issues relate to areas and populations to be served; interference to existing stations; and whether Section 73.28(d)(3) of the Rules (the 10% Rule) would be contravened, and, if so, whether circumstances exist which would warrant a waiver of that Rule. Hearing Examiner Jay A. Kyle, in an Initial Decision (FCC 63D-63) released June 4, 1963, recommended grant of the application. Exceptions were filed by Williams and by the Broadcast Bureau. Oral argument was held before a panel of the Review Board on November 26, 1963. The Review Board has considered the Initial Decision in light of the exceptions filed and the oral arguments of the parties. We agree with the Examiner's findings of fact and, accordingly, they are adopted. However, the Board views those findings as requiring a different ultimate result, as set forth infra. Our rulings on the exceptions are contained in the Appendix attached hereto.

2. The pertinent facts are as follows: Anadarko, Oklahoma, a city of 6,299 persons, is the county seat of Caddo County, wherein 28,621 persons reside. There are no standard broadcast, FM broadcast, or television broadcast stations in Anadarko or Caddo County. The proposal would bring a new service to 374,772 persons in an area of 21,576

[R. 308]

square miles. Anadarko now receives primary service (2 mv/m or greater) from 6 stations located at distances ranging from 18 miles to 82 miles. All urban communities of 2,500 persons or more, which would be served by the proposed station, presently receive primary service (2 mv/m or greater) from at least 5 stations. All rural parts that would be served now receive at least 14 services and some parts have as many as 22 services.

3. The proposed station will receive interference from 3 existing stations affecting 73,772 persons in 7,529 square miles, representing 16.4% of the population and 25.8% of the area within its proposed normally protected 0.5 mv/m contour. The proposed operation would cause co-channel interference to two existing stations, KWMT and KNOE, affecting 52,829 and 6,158 persons, respectively. Compared to the populations within the normally protected contours of the two stations, the population losses represent 0.6% in the case of KNOE and 2.3% in the case of KWMT. With regard to the latter station, the proposed interference would raise the total population loss to 3.2%. The remaining populations served by KNOE and KWMT exceed one million persons for each station. Both interference loss areas receive service from at least 12 other existing stations.

4. There was some evidence, submitted by affidavit, indicating that there has been no programming of interest to the Indians from Anadarko; no broadcasts have been made of high school football or basketball games, American Legion baseball games, or of performance of tribal songs and music lectures concerning Indian culture. In addition,

the Caddo County agricultural agent stated that he had difficulty in disseminating agricultural information in Caddo County because he never had access to radio facilities for such pruposes. Another witness stated that for the past four years he had been a State Highway Patrolman in Anadarko and Caddo County and that he incurred problems in the past in advising the people of Anadarko of changes in road conditions, such as closings or reroutings due to winter weather and storms, fires, disasters, and other such emergency situations. A pastor stated that, because of the inaccessibility of a radio station, his church had been unable to present religious programs to aged and physically disabled persons.

5. Since the Williams proposal is in violation of Section 73.28(d)(3) of the Commission's Rules, the principal question to be resolved is whether a waiver of this rule is warranted. The Hearing Examiner concluded, primarily on the basis of Southern Indiana Broadcasters, 24 FCC 521, 15 RR 349 (1957), that the public interest will be served through the waiver of the 10% Rule in this instance.

6. Williams, in his exceptions and at oral argument, supports the Initial Decision, but requests us to take certain additional facts and conclusions into consideration, as follows: (1) Williams made a frequency search and found that 540 kilocycles was

[R. 309]

the only frequency available for use in Anadarko; (2) Williams' consulting engineer attempted to design a directional antenna for the Williams proposal but concluded that a directional operation would not be feasible due to the low frequency proposed; (3) samplings of field intensity measurements on existing stations involved were made but were not submitted since they substantiated the FCC Soil Conductivity Map (Figure M-3); (4) there are unique and excellent propagation characteristics resulting from the low frequency requested and the unusually high soil conductivity in the Anadarko area; and (5) Anadarko is an unusual community with unique needs.

7. We agree with the Examiner that the question in this case is ". . . whether an area consisting of a town embracing 6,299 persons in a county of 28,621 in Southwest Oklahoma should have its first radio outlet despite the recognized interference involved." However, we disagree with the Examiner's conclusion that Commission precedent compels a grant of the subject application. The Southern Indiana case, supra, chiefly relied upon by the Examiner, did involve some circumstances similar to those present in this case. There, the successful applicant proposed to provide the community of Lawrenceville, Illinois, a city of 6,328 persons and the seat of a county of 20,539 persons with its first local transmission service. The Commission granted the application despite the fact that the proposal would receive 17.1% interference. However, the Lawrenceville proposal would have provided a second primary service to 12,378 persons and a third primary service to Lawrenceville itself, while Anadarko already has six other services available to it, and, it should be emphasized, all areas to receive service from the proposed Anadarko station have numerous reception services available. Also, the Lawrenceville proposal caused no interference to existing stations, whereas here the proposal would cause interference to two existing stations, affecting 58,987 persons.[1/]

8. The fact that a proposal will provide a first local transmission is relevant in determining whether a waiver of the 10% Rule is justified. However, in none of the cases cited by the Examiner or Williams has the Commission waived the 10% Rule solely because a proposal would provide a first local service. Moreover, the Commission has made it clear that a waiver does not automatically follow upon such a showing. The Commission has, on several occasions, denied applications which proposed to provide a first local service. In Louis Adelman, 28 FCC 432, 18 RR 97 (1960), the Commission denied an application which would have provided a first transmission service to Mt. Carmel, Pennsylvania, a city of 14,222 persons. The interference received was greater

1/ While the amount of interference here is not, of itself, sufficient to warrant denial of Williams' application, the Commission has held that interference caused to other stations should be taken into consideration in determining whether the 10% Rule should be waived. See Huntington-Montauk Broadcasting Co., Inc., 28 FCC 689, 691, 16 RR 192b, 192e (1960).

[R. 310]

than here, 22.5%, but only one radio station, 12 or 13 miles distant, provided service to Mount Carmel; and 7 other cities or parts thereof, with a total population of 35,411 persons, would have received a second primary service. The Commission denied the Mount Carmel application, noting that "Lawrenceville [Southern Indiana Broadcasters, supra] was a close and difficult case . . .".

9. In a recent case, Inter-Cities Broadcasting Co., 34 FCC 751, 25 RR 404 (1963), the Commission denied an application for a first local transmission service to Livonia, Michigan, a community of 67,000 persons in Wayne County and the Detroit Urbanized Area. The proposal would have received interference affecting 23.5% of the population within its normally protected contour. In denying the application, the Commission stated that "the inefficiency of the Inter-Cities proposal coupled with the numerous primary services now available to the proposed service area are fatal to the request for waiver."2/ (Emphasis added). While we recognize the distinctions between this case and Inter-Cities, the factor of service to underserved areas, which was present in the Southern Indiana case, is also lacking here. The establishment of a first local transmission service is an important goal, but the Commission has made it clear that service to underserved areas is an even more important goal. 3/ If Southern Indiana, which involved a second service to 12,378 persons and a third service to Lawrenceville, was considered a "close and difficult" case, we fail to see how that case compels a waiver in this instance.

10. The additional factors which Williams suggests favor waiver are not persuasive. Williams' contention that a finding should have been made that 540 kilocycles was the only frequency available to him is not supported by record evidence;[4/] Williams' request for a finding that measurements were taken but not submitted since they substantiated the Commission's Soil Conductivity Map is not supported by record evidence; and the facts that Williams' consulting engineer attempted to design a directional antenna to reduce interference but concluded that a directional antenna was not feasible, and that the

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[2/] All urban portions of the proposed service area received a minimum of five other stations and all rural areas received a minimum of ten stations.

[3/] See Basin Television Company, FCC 56-994, 13 RR 392, 404 (1956).

[4/] In support of this contention, Williams cites his Exhibits 14 and 15. Exhibit 14, an affidavit of Williams' consulting engineer, as pertinent, contains only the unsupported general statement that when the Anadarko application for 540 kilocycles was filed the availability of any other frequency was "extremely doubtful". Exhibit 15, Williams' affidavit concerning his frequency search, was not admitted into evidence mainly because of the lack of a statement of Williams' qualifications (Tr. 30, 32). Thus, Williams has not established that 540 kilocycles is the only frequency available.

Anadarko areas has unique and excellent propagation characteristics, are of little value in determining whether the 10% Rule should be waived.

11. Williams also contends that because of its Indian characteristics, the Anadarko area has unusual and unique needs, and that this factor should be taken into consideration in determining whether its 10% Rule violation should be waived. The Commission has, on occasion, granted waivers of Section 73.28(d)(3) based, at least in part, on the fact that the proposed operation would meet certain unusual needs of the area to be served.[5/] However, we are of the opinion that Williams has not satisfactorily shown that Anadarko or the wide area to be served,

especially the latter, has any special needs or that his proposed programming is designed to meet special needs. Regarding the needs of its Indian population, the only evidence submitted by Williams were affidavits of the Area Director for the Anadarko Area, Bureau of Indian Affairs, and an Anadarko resident who stated that, so far as they knew, there were no broadcasts of announcements of gatherings held by Indian groups or of performances of tribal songs, music or lectures concerning Indian culture.[6/] No concrete evidence was submitted, however, as to the number of Indians residing in the Anadarko area, what special needs these persons have, or how Williams proposes to satisfy these needs. Aside from the attempt to show Anadarko as a center of Indian culture, no showing was made of any other unusual needs that would not be present in most cities lacking a transmission service.[7/]

12. The Commission has stated that a waiver of the 10% Rule will be granted only in unusual circumstances in which it is demonstrated that the public interest requires such exceptional action. As previously indicated, the only significant factor which Williams has established in favor of his proposal is that it will provide Anadarko with its first local transmission servie. This fact, considered in light of the facts that Williams' proposal will receive interference affecting 16.4% of the population within its normally protected service area and will cause interference to two existing stations, and that Williams' service area (rural and urban) now receives an abundance of services, does not warrant a waiver of Section 73.28(d)(3) of the Commission's Rules.

[5/] See Stephens County Broadcasting Co., Inc., 30 FCC 921, 21 RR 414, (1960); and Alexandria Broadcasting Corp., 31 FCC 755, 22 RR 411 (1961).

[6/] No effort was made to show whether or not nearby stations have, in fact, carried programs of this nature.

[7/] Unlike the Alexandria case, supra, Williams did not establish the existence of any severe or unusual weather conditions.

ACCORDINGLY, IT IS ORDERED, This 15th day of January, 1964, That the application (BP-13635) of James R. Williams for a permit to construct a new Class II standard broadcast station to operate on 540 kilocycles with 250 watts power, daytime only, at Anadarko, Oklahoma, IS DENIED.

/s/ Donald J. Berkemeyer
Member, Review Board
Federal Communications Commission *

[Seal]

Attachments

Released: January 20, 1964

* See attached dissenting statement of Board Member Joseph N. Nelson.

APPENDIX

Rulings of the Review Board on Exceptions to Initial Decision

Exceptions of James R. Williams

Exception No.	Ruling
1	Denied. See paragraph 10 of this Decision.
2	Denied. The Examiner was correct in rejecting Williams' Exhibit No. 15. Williams' contention that there is contained in unidentified Commission files an affidavit showing Williams' experience does not cure the failure to qualify Williams at the hearing.
3	Denied. For the reasons stated in the Decision.

Exceptions of Broadcast Bureau

Exception No.	Ruling
1, 2	Granted.
3, 4, 5, 6, 7, and 8	Granted in substance for the reasons set forth in the Decision.

Dissenting Statement of Board Member
Joseph N. Nelson

I would waive the 10% rule and grant the subject application on the grounds that Anadarko has no local broadcast facility; that the interference received is relatively small; that it is a city with unusual characteristics; and that an affirmative showing of need has been made. The 10% rule is not inflexible and has been waived by the Commission in cases involving daytime and nighttime operation. The governing criterion for the waiver has been the public interest. Interstate Broadcasting Company, Inc., 265 F.2d 598 (1959). Accordingly, waivers are determined on a case-to-case basis. Lawrence A. Reilly, et al., 24 FCC 257, 14 RR 985.

At the outset, it is of more than passing interest to note that more than 10 years ago, the Commission found, after a 307(b) hearing, that Anadarko was in need of a first local transmission service. Lawton-Ft. Sill Broadcasting Company, FCC 52D-16, 7 RR 1216 (1952).[1/] The facilities granted were never built and Anadarko, and Caddo County of which it is the county seat, are presently without a local outlet, either AM, FM or TV. The majority's decision denies Anadarko another opportunity for its first radio outlet because the instant proposal would receive 16.4% interference. I am of the view that the majority has failed to give due weight to the peculiar characteristics of Anadarko and to its affirmative showing of need. It has eliminated the positive and accentuated the negative.

The Hearing Examiner found, in the instant case, as follows:

> "7. Anadarko and its environs are replete with Indian history and culture. It is known as 'The Indian Capital of the Nation,' and was named for a band of Indians. In 1859 the first Indian Agency was temporarily established southeast of Anadarko and in 1871 after being destroyed by a band of marauding Indians, it was relocated in the Washita River

about one and one-half miles north of Anadarko. In 1878 another Agency was consolidated with the Agency at Anadarko and moved south to Washita to the present site of Old Town in Anadarko, where the Agency remained until 1935 when it was moved to the Federal Building in Anadarko.

"8. In 1948 the Federal Government began the establishment of Area Indian Offices, with eleven such offices placed at strategic points in the United States. One of these offices is

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1/ In its conclusions, the Commission stated:

> "Thus, apart from the fact that Lawton proposes a fulltime rather than a daytime operation, which of itself constitutes a more efficient use of the frequency, a somewhat greater area and population would gain daytime service from Lawton than from the Anadarko applicant. It is our view, however, that the demonstrated need for a station in Anadarko, and Caddo County, and the consequent fairness and equity of an assignment to that city, outweigh these considerations arising out of a more efficient use of the frequency in Lawton than in Anadarko."

[R. 315]

the Anadarko Agency, which has four sub-agencies under it in western Oklahoma, serving 40,000 Indians and all the tribes in that part of the state. Anadarko is the site of the Annual Indian Exposition which has been held in the city for 31 years. Approximately 40,000 tourists attended the 1962 Exposition, which featured Indian arts and crafts, sports, dances, parades and pageants. The Riverside Indian School, located one mile north of Anadarko, dates back to 1871. Located two miles south of Anadarko is Indian City, USA, which is an outdoor museum designed to preserve as much as possible of the way of life of the Southern Plains Indians of a hundred years ago. At the present time, Indian Village, USA,

includes six different tribal villages, chosen to represent as wide a variation as possible of cultures among the Plains Indians. The site was once part of the larger Kiowa, Comanche and Apache reservation, and is in the Tonkawa Hills near the site of the massacre of the Tonkawa Indians by a band of the Shawnees and other mercenaries during the Civil War."

With respect to Anadarko's need for its first local outlet, the Hearing Examiner found:

"15. There is evidence that there has been no programming of interest to the Indians from Anadarko; no broadcasts have been made of high school football or basketball games, American Legion baseball league games, or of performances of tribal songs and music lectures concerning Indian culture. In addition the Caddo County Agricultural Agent stated that he has had difficulty in disseminating agricultural information in Caddo County because he never had access to radio facilities for such purposes. Another witness stated that he had been a State Highway patrolman in Anadarko and Caddo County and that he incurred problems in the past in advising the people of Anadarko of changes in the road conditions, such as closings or reroutings due to winter weather and storms, fires, disasters, and other such emergency situations. This witness said he knew of no instance when such information had been carried over a radio station for the benefit of Caddo County. Still another witness who had lived there for 32 years, and was manager of a retail business in Anadarko, stated that he had no access to a local radio station for advertising purposes."

No evidence was introduced controverting the above facts.

Traditionally, the Commission has been concerned with the radio needs and interests of the smaller communities of the country. Musical Heights, Inc., 29 FCC 1, 19 RR 49 (1960). Where nighttime operation was sought and the interference received was 77.1%, the Review Board granted

an application on the ground, among others, that the community involved was a small one in a sparsely-settled area. Birch Bay Broadcasting Company, Inc., FCC 63R-433 (September 23, 1963). In a case involving greater interference but with many factors similar to those in the instant proposal, the Commission granted a proposal where the first local outlet factor was presumptive only. Southern Indiana Broadcasters, 24 FCC 521, 15 RR 349 (1957). As is indicated above, the showing of need in this case consisted of affirmative, uncontroverted evidence. On the other hand, in cases involving daytime and nighttime operations where an affirmative showing of need or the uniqueness of the community was made, such evidence was stressed in the Commission's decisions granting the waivers. Alexandria Broadcasting Corp., 31 FCC 755, 22 RR 411 (1961); Stephens County Broadcasting Co., Inc., 30 FCC 921, 21 RR 414 (1960); Minnesota Valley Broadcasting Co., FCC 55-714, 11 RR 1080 (1955).

I believe that a showing of special circumstances was made in this case by the presentation of evidence indicating the unusual characteristics of Anadarko and by evidence indicating affirmatively rather than presumptively that a need exists for a local outlet in Anadarko. Accordingly, a grant is warranted on the basis of Commission precedents, or on a logical extension thereof. In re Charles County Broadcasting Co., Inc., FCC 63-821, par. 7 (September 16, 1963), 25 RR 903.

[Printer's note: Record pp. 316 and 317 are duplicates of pp. 314 and 315]

FCC 64R-212
50230

MEMORANDUM OPINION AND ORDER

By the Review Board: Berkemeyer and Slone. Board Member Nelson dissenting.

1. The Review Board has under consideration a petition for reconsideration, filed February 20, 1964, by James R. Williams (Williams); and an opposition thereto, filed March 4, 1964, by the Broadcast Bureau.

2. By Decision released January 20, 1964, FCC 64R-25, 36 FCC 154, 1 RR 2d 933, the Board denied the application of Williams for a new standard broadcast station at Anadarko, Oklahoma (540 kc, 250 w, daytime only, Class II).[1/] In that Decision, the Board concluded that Williams' proposal violated Section 73.28(d)(3) of the Rules (the 10% Rule); that the only significant factor favoring waiver of the violation is that the proposal would provide Anadarko with its first local transmission service; and that this factor does not warrant a waiver of the 10% Rule in this instance.

3. The material facts of this case, as set forth in our Decision, are not challenged by Williams. In addition to urging the importance of providing a first local transmission service, Williams again argues that the following factors, allegedly shown, also warrant a waiver of the 10% Rule: (a) the only reception service to Anadarko is provided by stations located many miles distant; (b) Anadarko is a unique community with unusual needs; (c) Anadarko's unique programming needs are not currently met by any of the stations now serving Anadarko; (d) grant of the Anadarko application will not cause excessive interference to any existing station; (e) there are unique and excellent propagation characteristics resulting from the extremely low frequency requested (540 kilocycles) and the unusually high soil conductivity of the Anadarko area; (f) the use of a directional antenna system to reduce the interference population percentage is not feasible; and (g) no other frequency is available for use at Anadarko.

4. With the exception of the supporting argument discussed in the next paragraph, all of the foregoing contentions and all of the points

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1/ Board Member Nelson dissented and issued a statement in support of a grant.

[R. 351]

made in more detail in the petition were carefully considered by the Board in its Decision.2/ Although in several places petitioner asserts that the Board failed to consider certain factors, our review of the Decision satisfies us that petitioner is wrong and that all the factors referred to were given adequate attention either in the text or in rulings on the exceptions.

5. Williams cites Birch Bay Broadcasting Company, Inc. (KARI), 35 FCC 445, 1 RR 2d 333, reconsideration denied, 35 FCC 806, 1 RR 2d 688 (1963), in support of his argument that Anadarko must be considered a "gray area" because six stations which provide primary service to it are located from 18 to 82 miles away. Birch Bay involved an application by a daytime only station for an increase in daytime power and an unlimited time operation. The circumstances warranting a grant were that most of the proposed service area received only two primary services and these services came from a city over 100 miles distant. Unlike the situation in Birch Bay, all parts of Williams' proposed service area receive at least five services, Anadarko receives six services, and five of these six services are located 50 miles or less from Anadarko. Therefore, neither of the considerations prompting waiver in the Birch Bay case is present here.

ACCORDINGLY, IT IS ORDERED, This 15th day of April, 1964, That the petition for reconsideration, filed February 20, 1964, by James R. Williams, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

[Seal]

/s/ Ben F. Waple
Secretary

Released: April 16, 1964

2/ The considerations set forth in paragraph 3 above were previously raised by Williams and considered in the listed paragraphs in our Decision:

Contention	Paragraph of Decision Where Considered
(a)	2, 7
(b)	6, 11
(c)	4, 11
(d)	3, 7
(e)	6, 10
(f)	6, 10
(g)	6, 10

[R. 385]

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FCC 64-814
54788

ORDER

By the Commission: Commissioner Lee dissenting; Commissioner Cox not participating.

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 2nd day of September, 1964;

The Commission having under consideration an application for review of the Review Board's decision herein, which application was filed May 18, 1964, by James R. Williams, an opposition thereto filed by the Chief, Broadcast Bureau, and a reply to such opposition filed by James R. Williams;

IT IS ORDERED, That the above-referenced application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

[Seal]

Released: September 8, 1964

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Tr. 12]

offered. Is there objection to receipt of the document?

MR. PERKINS: I have a question. Where it says in this affidavit, "The following are among the religious, civic, social and fraternal organizations located in Anadarko: " the second column on the list, third from the bottom, I notice "Caddo County Chapter Cancer Society."

Since it is a county-wide society, what do you mean by the expression it's located in Anadarko?

MR. HENNESSEY: Well, Anadarko is the county seat of Caddo County. The sphere of influence is such that the county organization will be located in Anadarko.

MR. PERKINS: In other words, to the extent that it has a headquarters, this is to imply that the headquarters is in Anadarko?

MR. HENNESSEY: That's right.

MR. PERKINS: All right. No objection.

MR. STRICK: I have no objection.

PRESIDING EXAMINER: Very well. Received.

(EXHIBIT 4 (WILLIAMS) WAS RECEIVED IN EVIDENCE.)

MR. HENNESSEY: I'm handing the reporter two copies of Williams Exhibit No. 5, an eight-page exhibit, entitled, "Indian Tribes of Western Oklahoma," prepared under affidavit of James R. Williams, dated October the 23rd, 1962.

(THE DOCUMENT ABOVE REFERRED TO WAS MARKED EXHIBIT 5 (WILLIAMS) FOR IDENTIFICATION.)

[Tr. 13]

PRESIDING EXAMINER: What is this? The history of the indians --

MR. HENNESSEY: Yes, sir.

PRESIDING EXAMINER: -- in Oklahoma?

[Tr. 13]

MR. HENNESSEY: Not all of the indians in Oklahoma, Mr. Examiner. This exhibit has been prepared for this purpose: There is an issue as to whether Williams's application complies with the ten percent rule, and, in Exhibit 1, it states that Williams application will receive in excess of 16 percent of interference to its proposed operation.

Now, it's the purpose of Williams Exhibit No. 5, first of all, to substantiate and supplement Williams Exhibit No. 2, which indicates the general nature of the community to be served; and, also, looking toward the waiver of the ten percent rule, to show that there is a unique community here and try to mitigate whatever the technical deficiencies as indicated in the ten percent rule might be with respect to this application.

PRESIDING EXAMINER: Very well. Is there objection to the receipt of Williams Exhibit No. 5?

MR. PERKINS: Well, I have a question. I still don't understand its relevance to the Williams application, because I can't tell that any of this refers to areas which the Williams proposal would serve, particularly interference free.

MR. STRICK: I have the same problem. It's a very interesting exhibit, but we have no idea of what areas are served.

[Tr. 14]

MR. PERKINS: I'm scanning this now, I don't see any specific connection to Anadarko, specifically, either, or the service area.

MR. HENNESSEY: Well, as indicated in paragraph 3, Williams Exhibit No. 2, Anadarko, Oklahoma, is the location of one of the four -- rather, well, of one of the main agencies of the Bureau of Indian Affairs.

MR. PERKINS: Do I understand by that that you therefore wish to show the nature of the tribes which you serve out of the Anadarko office?

MR. HENNESSEY: Yes.

MR. PERKINS: Well, are not all of these tribes in Exhibit No. 5 served out of the Anadarko Office?

MR. HENNESSEY: Yes. It mentions seven of them.

PRESIDING EXAMINER: Well, it says, "There are 24 tribes of Indians under the jurisdiction of the Anadarko Area Office," although there are 37 organized tribes in the State of Oklahoma.

MR. HENNESSEY: In other words, this indicates the sphere that is exerted by Anadarko with respect to Indian affairs, it's the main indian agency in the area and I think that it's relevant, certainly, as to Section 307(b). I'll admit that not every sentence in this exhibit is critical, of decisional importance, but it -- the exhibit in question, it seems to me, is of weight and admissible under Section 307(b).

MR. PERKINS: Well, I think that the importance of

[Tr. 15]

Anadarko is clearly indicated in Exhibit 2, in the second paragraph, it says, "-- set up with four sub-agencies in Oklahoma, services approximately 40,000 Indians and twenty-three tribes." And I think that the weight to be given your service area is clearly defined by the populations you will serve. But I don't see that it adds anything to your case to list all the Indian tribes in Oklahoma.

Now, without any showing that they constitute part of your population served, or where they are.

MR. STRICK: I tend to agree with Mr. Perkins. I can't see where it adds anything to -- of a decisional significance -- to this case.

PRESIDING EXAMINER: Well, frankly, I do not see -- I just hurriedly looked it over -- if it adds anything. It's not particularly dangerous, so I will let it stay in. I will receive it.

MR. PERKINS: I think what you say is true, sir, provided the argument is not later made that this radio station is going to have a direct bearing on the service which is afforded to all of these tribes

[Tr. 15]

listed in Exhibit No. 5.

PRESIDING EXAMINER: Oh, no, I don't receive it with that in mind at all.

MR. PERKINS: Because that is the implication which we could not see, Mr. Strick and I.

PRESIDING EXAMINER: Exhibit No. 5 will be received.

[Tr. 16]

(EXHIBIT 5 (WILLIAMS) WAS RECEIVED IN EVIDENCE.)

PRESIDING EXAMINER: I doubt what the value is, Mr. Perkins.

MR. PERKINS: It was very interesting.

PRESIDING EXAMINER: It is. I would like to read it, too.

MR. HENNESSEY: I'm handing the reporter --

PRESIDING EXAMINER: He even goes in here, you know, and tells us that Black Beaver is buried in Anadarko. I think that would be an interesting decision.

MR. PERKINS: There's also information about Geronimo on the last page, too.

PRESIDING EXAMINER: I noticed that. I caught that, too.

MR. HENNESSEY: I'm handing the reporter two copies of Williams Exhibit No. 6, which is four pages in length, prepared under the affidavit of James R. Williams, dated October 23rd, 1962, and is entitled, "Business Establishments within City Limits of Anadarko, Oklahoma."

(THE DOCUMENT ABOVE REFERRED TO WAS MARKED EXHIBIT 6 (WILLIAMS) FOR IDENTIFICATION.)

PRESIDING EXAMINER: The document has been marked for identification Williams Exhibit No. 6. Is there objection thereto?

MR. PERKINS: May we have your indulgence for a moment, sir?

PRESIDING EXAMINER: Yes.

MR. PERKINS: Mr. Hennessey, on page 4, Exhibit No. 6,

* * * * *

[Tr. 55]

board in a couple of recent cases, Thomas County Broadcasting and another recent case, Birch Broadcasting, has consistently followed this policy.

One of the factors which was instrumental in the waiver of the 10 percent rule historically has been the proposal of an applicant who would provide a first local transmission service. As counsel for the Bureau has correctly pointed out this is not, per se, reason for grant in this case; however, we think there are supplemental considerations which substantiate a conclusion which was correctly reached by the Examiner that the 10 percent rule should be waived and that the Williams application should be granted.

Let us consider first of all, the nature of the community to be served.

Anadarko, which is named for an Indian Tribe, is one of the county seats in Oklahoma. It is located 66 road miles from Oklahoma City, it is not part of a metropolitan area as was the situation in the Intercities case cited by the Bureau.

There are a number of county offices, there are a number of state offices, there are a number of federal offices in Anadarko. It has a rich Indian tradition stretching back for over a hundred year. The Bureau of Indian Affairs has one of its offices there. The Anadarko Indian Agency, together with its four sub-agencies serves 23 Indian tribes and about 40,000 Indians.

Now, we think that is of significance. We think that the

[Tr. 56]

Anadarko community is unique and that its needs are not served by any of the existing six reception services. The record shows that the nearest reception service to Anadarko is 18 miles away, I believe the next closest one is 34 miles away, the next two closest ones are 50

[Tr. 56]

miles away. We feel that these stations by being located so far from Anadarko do not serve the programming needs of Anadarko.

Now, in this connection it should be observed that in any allocation decision which is presented here before the Review Board, not only reception services but also transmission services are to be considered by the review board and that the public interest would be furthered by grant of this transmission service for which there is an urgent need.

There is a presumption that there is a strong need for a first local outlet; there is also a presumption that any applicant will meet the needs of his proposed location. There was an attempt to rebut this presumption by Harwell B. Shepard, trading as Olney Broadcasting Company, who requested enlargement of issues against the Williams application to determine whether the Williams application would meet the programming needs of its proposed area.

The Commission properly determined that there was no need for enlargement of the issues as requested by Olney. I think that strengthens the presumption that Williams is going to serve his programming needs.

[Tr. 57]

I would like to address myself also to the Southern Indiana case which is set forth in the Examiner's initial decision, points out the many similarities between the Lawrenceville application and the Anadarko application which is before the Review Board.

As the Bureau has pointed out one of the considerations was the fact that there were small areas of white or gray, small white or gray areas which would have been served by the Lawrenceville applicant. In the instant case, because of the factors previously mentioned, which indicate that the nearest available service to Anadarko is 18 miles away and that the other services available are of considerable greater distance, we feel that the mere numerical detailing of the available services to Anadarko is not of decisional significance in this case in the sense that it should be considered adversely to Anadarko.

The interference caused by Anadarko to KWMT and KNOE, would leave these respective operations with in excess of 2 million population in the case of KWMT, and KNOE would still serve in excess of 100 million. We do not feel that under these circumstances the interference caused by the Anadarko applicant --

THE CHAIRMAN: 100 million, sir?

MR. HENNESSEY: I am sorry -- it would be in excess of 1 million.

We do not feel that under these circumstances the interference which would be caused by the Anadarko application should be

[Tr. 58]

considered adversely.

In conclusion I would like to state that we have before the Review Board a unique community, a community which exerts its own sphere of influence in an Indian area; it is not served by any of the reception services available to it, the reception services do not meet its unique needs. Were it not for the fact that the applicant proposes to operate at 540 kilocycles the interference here might not be so great. This is actually an efficient operation because in terms of the frequency and the power it proposes while it proposes to operate with only 250 watts, the interference-free service would extend to in excess of 374,000 people in an area of 21,576 square miles.

We think that under all these circumstances that the Examiner's conclusion that the 10 percent waiver was appropriate should be affirmed by the Review Board.

THE CHAIRMAN: Mr. Nelson, have you some questions?

MR. NELSON: Mr. Hennessey, you mentioned the particular characteristics of Anadarko.

MR. HENNESSEY: Yes, sir.

MR. NELSON: And you recall Mr. Stirmer felt that those particular characteristics did not evidence any needs separate and apart from any other community and therefore no added weight should be given because of those characteristics.

* * * * *

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,943

JAMES R. WILLIAMS,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Appeal from a Decision and Orders of the
Federal Communications Commission

ROBERT M. BOOTH, JR.

JOSEPH F. HENNESSEY

1735 DeSales Street, N.W.
Washington, D. C. 20036

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James R. Williams

January 18, 1965

QUESTIONS PRESENTED

1. Whether the Commission's reference to the failure of Appellant to submit evidence concerning his proposed program service was prejudicial in light of an earlier Commission ruling that addition of an issue concerning Appellant's proposed program service was not justified.

2. Whether the Commission properly weighed and considered all of the relevant and material evidence concerning the unique Indian characteristics, population and institutions of Anadarko and the surrounding area, the need for a local radio service and the absence of any meaningful program service from any existing station.

3. Whether the Commission erred by failing to grant a waiver of Section 73.28(d)(3) of its Rules.

4. Whether Section 73.28(d)(3) of the Commission's Rules, as applied and interpreted in this proceeding, violates the basic purpose for which the Commission was created and various provisions of the Communications Act of 1934, as amended, including Sections 1, 303, and 307(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules:

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by James R. Williams, taken pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 USC §402(b), and Rule 37 of this Court from (1) a Decision of the Review Board of the Federal Communications Commission, released January 20, 1964, denying Appellant's application for a construction permit for

a new standard broadcast station at Anadarko, Oklahoma (R. 307-318),[1] (2) a Memorandum Opinion and Order of the Commission's Review Board, released April 20, 1964, denying Appellant's petition for reconsideration of said Decision (R. 350-351), and (3) an Order of the Commission, released September 8, 1964, denying Appellant's application for review of said Decision and Memorandum Opinion and Order (R. 385). A notice of appeal was timely filed with this Court on October 8, 1964.

STATEMENT OF THE CASE

Section 307(b) of the Communications Act of 1934, as amended, 47 USC §307(b), provides as follows:

> "In considering application for licenses, and modifications and renewals thereof, when and insofar as there is a demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Section 8(b) of the Administrative Procedure Act, 5 USC §1007(b), requires that decisions of an administrative agency must include findings and conclusions, as well as the reasons or basis therefor. It is well settled that findings and conclusions must be supported by substantial evidence. This appeal involves interpretation and application of both of these statutory provisions.

One of the American Indian centers in the United States is at Anadarko, Oklahoma, where one of the Federal Government's eleven Area Indian Offices is situated. Because of its size and importance, Anadarko is known as "The Indian Capital of the Nation" (R. 158, 159).

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[1] Citations given as "R. ___" are to the record filed with the Court.

Anadarko has a population of 6,299 and is the county seat of Caddo County which has a population of 28,621. Neither Anadarko nor Caddo County has a radio broadcast station to serve the unique needs of the Indians and other residents of the area (R. 129). Although six stations[2] provide a primary (listenable) signal in Anadarko, one is located 18 miles away in Chickasha, another is 34 miles away in Lawton, a third is 47 miles away in Norman, two others are 50 miles away in Oklahoma City, and the sixth is in Wichita Falls, Texas, more than 80 miles away[3,4] (R. 190).

In recognition of the needs of Anadarko and Caddo County for their own local broadcast station to provide an outlet for local news, weather, education and self-expression, as enhanced by the unique problems and needs of the Indians of the area, Appellant filed the instant application for a new station at Anadarko.

Both because Appellant's application was mutually exclusive with an application for a new standard broadcast station at Olney, Texas,[5] and because the proposed operation at Anadarko presented some problems of interference to and from co-channel stations KNOE, Monroe, Louisiana, and KWMT, Fort Dodge, Iowa, each more than 400 miles from Anadarko, the Commission designated the two applications for hearing by an order released May 14, 1962 (R. 81-83). In its order, the Commission found Appellant "legally, financially and technically qualified", except as noted in the issues. One of the issues related to compliance by Appellant's proposal with Section 73.28(d)(3) of the Commission's Rules, 47 CFR §73.28(d)(3), with particular reference as to

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[2] All stations referred to in this brief, unless otherwise noted, are standard (AM) broadcast stations.

[3] All distances are approximate airline miles. Except for Wichita Falls, all cities are in Oklahoma.

[4] It will be shown later in this brief that the evidence established that not one of these six stations has provided any programming to meet the needs of Anadarko and the surrounding area for a local program service.

[5] The applicant was Harwell V. Shepard, tr/as Olney Broadcasting Company, File No. BP-10494, Docket No. 14639.

whether more than ten per cent of the population within the normally protected 0.5 millivolt per meter (mv/m) contour would not receive service because of objectionable interference from existing stations (R. 82). Although the licensees of KNOE and KWMT were named party respondents, KNOE participated in the hearing only to a very limited extent and KWMT failed to appear at the hearing (R. 82, 238).

Shortly after the applications were designated for hearing, the Olney applicant petitioned the Commission to enlarge the issues to require a showing by Appellant that his program proposals for Anadarko and the surrounding area were based upon a study of the needs of the area and were designed to satisfy those needs (R. 88-92). After Appellant demonstrated that his proposals were based upon studies of the needs for local program service, the Commission, by a Memorandum Opinion and Order released July 27, 1962, denied the petition and, in so doing, explicitly held that there was no need for Appellant to make a showing at the hearing as to whether his programming was designed for and would serve the needs of Anadarko and the surrounding area (R. 114-115). As will be shown later in this brief, the Commission's Review Board, in its final decision, found that Appellant had failed to show unique programming needs for Anadarko or how he would meet such programming needs *even though the Commission earlier had held, by refusing to add a programming issue, that programming evidence was not required to support a grant of Appellant's application.* (R. 114-115).

Before the hearing began, the Olney, Texas, application was dismissed at the request of the applicant. At the hearing, Appellant introduced evidence showing that 448,544 persons in an area of 29,105 square miles within the normally protected 0.5 mv/m contour would receive service in the absence of interference, and that, because of interference from existing stations encompassing 73,772 persons in areas totalling 7,529 square miles, interference-free service would be provided to 374,742 persons in an area of 21,576 square miles (R. 155). Appellant,

by use of the written procedure permitted by the Commission's Rules and ~~Practices~~ procedure, also offered the testimony of six residents of Anadarko to the effect that no station providing a primary service to Anadarko and the area had never provided local programming for Anadarko or satisfied the need of Anadarko and the Indian residents of the area (R. 184-189).

The Hearing Examiner issued an Initial Decision proposing to grant Appellant's application (R. 236-251). With respect to the unique characteristics and needs of Anadarko for its first broadcast station and outlet for local news and self-expression, the Hearing Examiner made the following findings of fact:

> "7. Anadarko and its environs are replete with Indian history and culture. It is known as 'The Indian Capital of the Nation', and was named for a band of Indians. In 1859 the first Indian Agency was temporarily established southeast of Anadarko and in 1871 after being destroyed by a band of marauding Indians, it was relocated on the Washita River about one and one-half miles north of Anadarko. In 1878 another Agency was consolidated with the Agency at Anadarko and moved south to Washita to the present site of Old Town in Anadarko, where the Agency remained until 1935 when it was moved to the Federal Building in Anadarko.
>
> "8. In 1948 the Federal Government began the establishment of Area Indian Offices, with eleven such offices placed at strategic points in the United States. One of these offices is the Anadarko Agency, which has four sub-agencies under it in western Oklahoma, serving 40,000 Indians and all the tribes in that part of the state. Anadarko is the site of the Annual Indian Exposition which has been held in the city for 31 years. Approximately 40,000 tourists attended the 1962 Exposition, which featured Indian arts and crafts, sports, dances, parades and pageants. The Riverside Indian School, located one mile north of Anadarko, dates back to 1871. Located two miles south of Anadarko is Indian City, USA, which is an outdoor museum designed to preserve as much as possible of the way of life of the Southern Plains Indians of a hundred years ago. At the

present time, Indian Village, USA, includes six different tribal villages, chosen to represent as wide a variation as possible of cultures among the Plains Indians. The site was once part of the larger Kiowa, Commanche and Apache reservation, and is in the Tonkawa Hills near the site of the massacre of the Tonkawa Indians by a band of the Shawnees and other mercenaries during the Civil War" (R. 238-239).

* * * * *

"15. There is evidence that there has been no programming of interest to the Indians from Anadarko; no broadcasts have been made of high school football or basketball games, American Legion baseball games, or of performances of tribal songs and music lectures concerning Indian culture. In addition the Caddo County Agricultural Agent stated that he has had difficulty in disseminating agricultural information in Caddo County because he never had access to radio facilities for such purposes. Another witness stated that he had been a State Highway patrolman in Anadarko and Caddo County and that he incurred problems in the past in advising the people of Anadarko of changes in the road conditions, such as closings or reroutings due to winter weather and storms, fires, disasters, and other such emergency situations. This witness said he knew of no instance when such information had been carried over a radio station for the benefit of Caddo County. Still another witness who had lived there for 32 years, and was manager of a retail business in Anadarko, stated that he had no access to a local radio station for advertising purposes" (R. 241-242).

He also found that there are no broadcast stations in either Anadarko or Caddo County and that only six stations, from 18 to 82 miles distant, provide a primary (listenable) signal to Anadarko (R. 239-240). In granting a waiver of the ten per cent rule, Section 73.28(d)(3), 47 CFR §73.28(d)(3), the Hearing Examiner relied upon and quoted three opinions of this Court, *Beaumont Broadcasting Corp. v. Federal Communications Commission,* 91 U.S. App. D.C. 111, 202 F.2d 306 (1952); *Interstate Broadcasting Co. v. Federal Communications Commission,* 105 U.S. App. D.C. 224, 265 F.2d 598 (1959); and *Star of The Plains Broadcasting Company v. Federal Communications Commission,* 105

U.S. App. D.C. 352, 267 F.2d 629 (1959). He also cited and discussed at length the following decisions of the Commission which support a waiver of the ten per cent rule and grant of Appellant's application: *Reilly and Spates,* 24 FCC 257, 14 RR 985 (1958); *Southern Indiana Broadcasters, Inc.,* 24 FCC 521, 15 RR 349 (1958); *Hammonton Broadcasting Company,* 21 RR 199 (1961); *Regional Radio Service,* 32 FCC 1073, 23 RR 599 (1962); and *Old Belt Broadcasting Corp.,* 30 FCC 1067, 20 RR 1035 (1961). The Hearing Examiner then reached the following conclusions.

> "16. . . . In *Star of the Plains,* the six services are all located only 16 miles from the community involved. It cannot be either reconciled or construed that the six primary services available to Anadarko are a satisfactory substitute for a local facility as a means of community self-expression by Anadarko and Caddo County" (R. 246).
>
> * * * * *
>
> "22. The grant of this application would be consonant with Section 307(b) of the Communications Act which directs the Commission to:
>
> > 'make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.'
>
> It is established that the mandate of this statute requires a fair distribution of facilities for the transmission of radio service as well as reception facilities. *Pinellas Broadcasting Co. v. Federal Communications Commission,* 230 F.2d 204, 207 (1956)"[6] (R. 249).

Exceptions to the Initial Decision and supporting briefs were filed both by the Appellant and the Commission's Broadcast Bureau (R. 252-281). Appellant's exceptions were based upon the rejection of evidence offered to prove that the requested 540 kc frequency was the only channel

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[6] 97 U.S. App. D.C. 236.

available for use at Anadarko (R. 252-255). The Broadcast Bureau, in its exceptions and brief, urged a strict and rigid application of the ten per cent rule and denial of Appellant's application (R. 262-274). Following oral argument, the Review Board issued a final decision refusing to grant a waiver of the ten per cent rule, and, as a result, denying the application.

The Commission's Review Board, in its Decision, adopted each and every finding of fact of the Initial Decision, stating that "We agree with the Examiner's findings of fact and, accordingly, they are adopted" (R. 307). However, there was violent disagreement among the three Board members as to the weight and effect to be given to the evidence and to the interpretation and application of applicable opinions of this Court and decisions of the Commission.

The majority, after having adopted each and every finding of fact of the Initial Decision, then proceeded to downgrade and discount the evidence and the findings of fact. In concluding that ". . . we are of the opinion that Williams has not satisfactorily shown that Anadarko or the wide area to be served, especially the latter, has any special needs or *that his proposed programming is designed to meet special needs.*" (R. 311) (Italics supplied), the majority obviously overlooked the fact that the Commission (not the Review Board) had denied a petition to add "an issue to this proceeding, to determine whether the proposed program service of Williams was designed for and would serve his service area" (R. 114-115). In relying heavily upon the fact that "Anadarko already has six other services available to it", the majority gave no consideration whatsoever to this Court's opinion in *Star of The Plains, supra.* (R. 309). The majority gave absolutely no consideration to the equitable distribution of radio service mandate of Section 307(b) of the Communications Act of 1934, as amended, 47 USC §307(b), and did not even mention the section. Other patent errors in the majority's opinion are discussed in the brief which follows.

The dissenting Board member quoted the findings of fact contained in paragraphs 7, 8, and 15 of the Initial Decision, which are quoted above, and, as did the Hearing Examiner, applied the facts to the basic principles of law and to the many applicable opinions and decisions. He strongly urged a waiver of the ten per cent rule and grant of Appellant's application.

Subsequently, the Review Board denied Appellant's petition for reconsideration (R. 350-351), and the Commission, with one Commissioner dissenting and another not participating, denied Appellant's application for review (R. 385).

This appeal, then, presents the unusual situation where four persons, in their quasi-judicial roles, have split equally on the weight to be given to the evidence. The Hearing Examiner and one Board member, considering the evidence in the light of applicable opinions of this Court, concluded that the public interest would be served by providing Anadarko and Caddo County, Oklahoma, with their first and only broadcast station. The other two, without considering this Court's opinions, including the *Beaumont* and *Star of The Plains* opinions, *supra*, concluded that Appellant's application must be denied.

STATUTES AND RULES INVOLVED

Relevant portions of statutes and rules and regulations of the Federal Communications Commission are printed as an appendix to this brief.

STATEMENT OF POINTS

1. The Commission's final decision, adopted by only two of the three participating members of its Review Board, contains such significant and prejudicial misstatements of fact that Appellant has been denied the full and fair hearing to which he is entitled.

2. After the Commission twice had held, in appropriate orders, that evidence as to Appellant's program proposals and plans for the proposed operation was not required, it was unlawful for the Review Board, in its decision, to refer to the fact that Appellant had not offered such evidence and to base its decision, in part, upon the absence of such evidence from the record.

3. In considering the needs of Anadarko and Caddo County for its first radio station and outlet for local self-expression, the Review Board erroneously assumed that stations from 18 to 82 miles from Anadarko now provide service which meets the local needs of Anadarko and the surrounding area.

4. When all of the facts are carefully considered, a waiver of the ten per cent rule, Section 73.28(d)(3), and grant of Appellant's application is required.

5. Section 73.28(d)(3) is an unlawful exercise of the Commission's rule making power if so strictly and rigidly applied as to prevent the establishment of the first standard broadcast station in relatively small communities remote from larger centers of population.

SUMMARY OF ARGUMENT

The establishment of broadcast stations in the United States is controlled by Section 307(b) of the Communications Act of 1934, as amended, which requires a fair, efficient, and equitable distribution of radio service among the several States and communities.

The term "radio service", as used in Section 307(b) comprehends both transmission service and reception service. Transmission service is the availability of a readily accessible broadcast station to serve as an outlet for local self-expression, local news, local weather, local highway conditions, local emergency bulletins, local governmental programs, local election campaigns and returns, local educational programs; local charitable and religious programs, and dozens of other local services. Reception service, on the other hand, is merely the availability of a listenable signal, even from a distant station. Of the two, transmission service is far more important.

Appellant offered extensive evidence concerning the characteristics of Anadarko and the surrounding area and their needs for a local radio station. The Hearing Examiner, in his Initial Decision, made rather detailed findings of fact based upon consideration of most of the evidence. The Review Board adopted, without modification, each and every one of the Hearing Examiner's findings of fact. Instead of relying upon and giving full weight to those findings of fact, however, the majority of the Review Board not only ignored most of the findings of fact it had adopted, but even affirmatively stated that certain evidence was not contained in the record when it was clearly set forth in an exhibit which had been received in evidence. By ignoring relevant and material findings of fact, the majority of the Review Board violated the principles set forth in *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 488, 71 S.Ct. 456 (1943). Carelessness in reviewing the evidence has deprived Appellant of the full and fair hearing to which he is entitled. *Saginaw Broadcasting Company v. Federal Communications Commission,* 68 U.S. App. D.C. 282, 96 F.2d 554, *cert. denied,* 305 U.S. 613, 59 S.Ct. 72 (1938).

When the Commission designated Appellant's application for hearing, it found Appellant "legally, financially, technically and otherwise qualified" to construct and operate the proposed station except as indicated in the issues which were related to and required only engineering

(technical) evidence. Before a mutually exclusive application designated for hearing in consolidation with Appellant's application was dismissed, that applicant petitioned the Commission to add an issue which would have required Appellant to introduce evidence concerning his program proposals and plans. After consideration of Appellant's opposition, the Commission issued an Order denying the request for a programming issue. By so doing, the Commission affirmatively stated that programming evidence was not required for it to reach its decision. Even though the Commission had twice stated that programming evidence was not required, and even though Appellant was precluded by the issues from offering such evidence, the majority of the Review Board repeatedly commented upon Appellant's failure to present such evidence in concluding that Appellant had failed to establish any unusual need for his proposed station. To penalize Appellant for failing to offer evidence not permitted by the issues was arbitrary and capricious.

This Court has recognized in a number of opinions that the term "radio service" in Section 307(b) of the Communications Act comprehends both transmission service and reception service. In *Star of The Plains v. Federal Communications Commission, supra*, this Court held that the Commission could not assume that six stations located in a city 16 miles away provided a program service which met the needs of the applicant's community merely because they provided primary service to that community. Thus, under that doctrine, it must be held that the six stations which provide primary service to Anadarko, from 18 to 82 miles distant, cannot be assumed to provide a program service which meets the local needs of Anadarko. In addition, Appellant offered affirmative evidence, through residents of Anadarko, that no broadcast station had ever broadcast programs which met certain local needs of Anadarko and Caddo County.

Although the Hearing Examiner discussed the *Star of The Plains* opinion and Appellant's evidence at considerable length in his Initial Decision, the majority of the Review Board did not even mention the *Star*

of The Plains opinion when it held that "Anadarko already has six other services available to it" (R. 309), and when it concluded that no unusual need had been shown for a local station at Anadarko. The majority's conclusion is contrary to the evidence as well as to the *Star of The Plains* doctrine.

After having concluded that interference which would be caused to two existing stations would not be so severe as to prevent a grant of Appellant's application, the Review Board then considered whether a waiver of Section 73.28(d)(3) of the Commission's Rules, 47 CFR §73.28(d)(3), should be granted. Section 73.28(d)(3), the so-called ten per cent rule, had been adopted for the purpose of prohibiting the grant of an application where the proposed operation would suffer interference to such an extent that its service would be reduced to an unsatisfactory degree. Both the Hearing Examiner and the dissenting member of the Review Board considered all of the findings of fact based upon the evidence and, after reviewing earlier decisions of the Commission, concluded that a waiver should be granted. The majority of the Review Board, however, after failing to consider many of the findings of fact it had adopted, after having considered the erroneous statements, findings and conclusions discussed above, and after ignoring the doctrine of *Star of The Plains* and the related evidence, concluded that a waiver should not be granted. The evidence and the applicable law, including opinions of this Court and numerous ~~discussions~~ decisions of the Commission, do not support the majority's refusal to waive Section 73.28(d)(3) and grant Appellant's application.

Section 1 of the Communications Act of 1934, as amended, 47 USC §151, states that the Commission was established for the purpose of providing, ". . . so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." Section 303(r) of the Act, 47 USC §303(r), authorizes the Commission to make such rules and regulations ". . . not inconsistent with law, as may be necessary to carry out the provisions of this Act."

Section 307(b) directs the Commission to make a fair, efficient, and equitable distribution of radio service to the several States and communities.

As noted above, Section 73.28(d)(3) was adopted to prohibit the grant of an application where the proposed operation would "suffer interference to such an extent that its service would be reduced to an unsatisfactory degree." *Reese Broadcasting Corp.*, 1 RR 2nd 1061 (1964).

The proposed station would satisfy the objectives of Section 73.28(d)(3) because it would provide a local service to Anadarko and Caddo County and a wide-area service to 374,772 persons in an area of 21,576 square miles. Even though the proposed station would receive 16.4% interference, the closest interference area would be at least 64 miles from Anadarko, and service would be provided as far as 98 miles from Anadarko. Numerous prior decisions of the Commission support a waiver of Section 73.28(d)(3) and the grant of the application.

If Section 73.28(d)(3) is to be so strictly and rigidly applied as to prohibit a grant of Appellant's application it is an unlawful exercise of the Commission's rule making authority because it severely penalizes applicants seeking to establish the first station in small communities and rural areas.

ARGUMENT

I.

THE REVIEW BOARD'S DECISION, ADOPTED BY ONLY TWO OF ITS THREE PARTICIPATING MEMBERS, CONTAINS SIGNIFICANT AND PREJUDICIAL MISSTATEMENTS OF FACT

It is well settled that the findings of fact and conclusions of law must be based upon consideration of all of the relevant and material evidence, and that administrative agencies cannot "pick and choose"

evidence to support a particular conclusion. *Universal Camera Corp. v. National Labor Relations Board, supra.* Unfortunately, and to the severe prejudice of the Appellant, the Decision of the Review Board, adopted by only two of the three participating members, contains a number of glaring and highly prejudicial errors.

After having stated in paragraph 1, that "We agree with the Examiner's findings of fact and, accordingly, they are adopted" (R. 307), the Board, in paragraph 11, stated that:

> "No concrete evidence was submitted, however, *as to the number of Indians residing in the Anadarko area,* what special needs these persons have, or how Williams proposes to satisfy these needs" (R. 311). (Italics supplied).

The statement that no evidence was submitted "as to the number of Indians residing in the Anadarko area" is so grossly inaccurate as to be arbitrary and capricious. In an exhibit describing the Indian Tribes of Western Oklahoma, Williams Exhibit No. 5 (R. 171-178), the following appears on page 2, lines 6 to 8:

> "Of a total number of 36,877 Indians under the guidance of the Anadarko Area Office, 21,611 still live on the former allotment" (R. 172).

Such carelessness in reviewing the evidence has deprived Appellant of the full and fair hearing to which he is entitled. *Saginaw Broadcasting Company v. Federal Communications Commission, supra.* For this reason alone, the Decision should be set aside by this Court.

A second most prejudicial error appears in paragraph 11 of the Decision (R. 311), where the Review Board twice stated that Williams

had not made a showing of special needs of the Indians residing in the Anadarko area.[7]

Extensive evidence concerning the Indians is contained in Williams Exhibits 2, 5 and 7 to 12, inclusive (R. 157-166, 171-178, 184-189). Contrary to the statement that the evidence did not show the needs particularly of the "wide area to be served", Williams Exhibit No. 5, headed "Indian Tribes of Western Oklahoma", is not limited to Anadarko but includes evidence concerning the Comanche tribe now living in the Lawton, Oklahoma, area, 34 miles south of Anadarko (R. 172), the reservation of the Wichita tribe near the Caddo-Grady County line, some 10 miles to the east of Anadarko (R. 173), the Cheyenne tribe at Concho, Oklahoma, some 43 miles north northeast of Anadarko (R. 174), and the Fort Sill Apaches at Fort Sill, Oklahoma, some 31 miles south southwest of Anadarko (R. 177-178).[8] In addition, Williams Exhibit No. 2 on page 1, listed the Indian tribes and the Area Field Agencies throughout western Oklahoma (R. 158).

The Hearing Examiner's findings of fact in paragraphs 7, 8 and 15 of the Initial Decision, which are quoted on pages 5 and 6, above, are summaries of the evidence in Williams Exhibits 2, 5 and 7 to 12, inclusive (R. 157-166, 171-178, 184-189). If the majority of the Review Board,

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[7] The statements appear in the following sentences of paragraph 11:

> "However, we are of the opinion that Williams has not satisfactorily shown that Anadarko or the wide area to be served, particularly the latter, has any special needs or that his proposed programming is designed to meet special needs."
>
> * * * * *
>
> "No concrete evidence was submitted, however, as to the number of Indians residing in the Anadarko area, what special needs these persons have, or how Williams proposes to satisfy these needs" (R. 311).

[8] The distances to Lawton, the Caddo-Grady County line, and Lawton are scaled from the maps in Williams Exhibit No. 1, pages 9 and 26. (R. 137, 154). Although not shown on these maps, a Rand McNally Atlas shows Concho as being located some 7 miles north of El Reno, which is shown on pages 9 and 26.

after reviewing the evidence presented in those exhibits, had believed that the findings of fact did not accurately and fully summarize the evidence, it was required by law to revise the findings of fact rather than to adopt those of the Initial Decision.

Significantly, the dissenting Board member, after quoting paragraphs 7, 8 and 15 of the findings of fact and noting that "no evidence was introduced controverting the above facts" (R. 316), concluded as follows:

> "I believe that a showing of special circumstances was made in the case by the presentation of evidence indicating the unusual characteristics of Anadarko and by evidence indicating *affirmatively rather than presumptively* that a need exists for a local outlet in Anadarko. Accordingly, a grant is warranted on the basis of Commission precedents, or a logical extension thereof. In re *Charles County Broadcasting Co., Inc.*, FCC 63-821, par. 7 (September 16, 1963), 25 RR 903" (R. 317).

The conclusion is inescapable that the majority gave no significant weight to the findings of fact which it adopted as its own. It is readily apparent from the findings of fact, from the inaccuracies in the Decision discussed above, from the dissenting statement of the third Board member, and from the Initial Decision, that the evidence conclusively proves a unique need for a local broadcast station at Anadarko. The Decision must be set aside as being contrary to the evidence of record.

II.

AFTER A RULING BY THE COMMISSION THAT EVIDENCE AS TO APPELLANT'S PROGRAM PROPOSALS AND PLANS WAS NOT REQUIRED, THE REVIEW BOARD UNLAWFULLY PENALIZED APPELLANT FOR FAILING TO SUBMIT SUCH EVIDENCE

The Review Board, in paragraph 11 of its Decision (R. 311), twice referred to and gave great weight to the fact that Appellant did not submit evidence concerning his program proposals and plans:

> "However, we are of the opinion that Williams has not satisfactorily shown that Anadarko and the wide area to be served, especially the latter, has any special needs *or that his proposed programming is designed to meet special needs.*"
>
> * * * * *
>
> "No concrete evidence was submitted, however, as to the number of Indians residing in the Anadarko area, what special needs these persons have, *or how Williams proposes to satisfy those needs.*" (R. 311). (Italics supplied).

The Commission twice stated before the hearing even began that evidence concerning Appellant's program proposals and plans was not necessary or required for the Commission to pass upon the application. Thus, it was a most prejudicial error for the majority of the Review Board to comment upon and give weight to the absence of program evidence in the record.

When the Commission designated Appellant's application for hearing, it stated as follows in its order:

> "The Commission having under consideration the above-captioned and described applications;
>
> "IT APPEARING, That, except as indicated by the issues specified below, each of the instant applicants is legally, technically, financially, and *otherwise qualified* to construct and operate the instant proposals;" (R. 81). (Italics supplied).

In specifying only issues which contemplated or required engineering (technical) evidence, the Commission affirmatively found that Appellant's program proposals and plans satisfied the needs of the population and area to be served.

Shortly after the hearing order was issued, the mutually exclusive applicant for Olney, Texas, petitioned the Commission to enlarge the issues to determine if Appellant's program proposals and plans were based upon a study of the needs of Anadarko and the surrounding area and were designed to satisfy those needs (R. 88-92). After Appellant demonstrated

that his program proposals were based upon a study of the needs, the Commission, by a Memorandum Opinion and Order, denied the petition (R. 114-115). *Thus, for the second time the Commission affirmatively stated that Appellant was not to offer evidence concerning his program proposals and plans.*

Had Appellant offered evidence of his program proposals under the issues specified by the Commission in the hearing order, it would have been rejected as not being encompassed by the issues.

If the Review Board, after review of the evidence and the Initial Decision, believed that evidence concerning Appellant's program proposals was necessary to support a grant of the application, it should have set aside the Initial Decision, added a program issue, and ordered a further hearing.

Even reference to the failure of Appellant to submit evidence as to his program proposals when the issues precluded acceptance and consideration of such evidence was most erroneous and prejudicial.

III.

THE REVIEW BOARD ERRONEOUSLY CONCLUDED THAT DISTANT STATIONS SERVE THE NEEDS OF ANADARKO FOR LOCAL SERVICE

Anadarko now receives primary service (signals of at least 2 millivolts per meter in strength) from six stations, one located 18 miles away, a second 34 miles, a third 47 miles, two at 50 miles, and a sixth at 82 miles (R. 240). The question of need for a local station at Anadarko depends, to a very large extent, upon whether any of those stations provide a program service which meets the local needs of Anadarko.

In *Star of The Plains v. Federal Communications Commission, supra,* this Court held that the Commission could not assume that six stations located in Lubbock, Texas, provided a program service which met the needs of Slaton, 16 miles from Lubbock and within the Lubbock

metropolitan area, merely because they provided a primary service signal to Slaton:

> "Apparently, the Commission relied upon its expertise in . . . assuming that whatever Slaton's local needs might be, they would be sufficiently filled by Lubbock's six stations. However, as we said in another context: 'Commission expertise alone cannot support [such] pivotal assumption[s]'."

The statement was supported by numerous authorities, including this Court's opinions in *Easton Publishing Company v. Federal Communications Commission,* 85 U.S. App. D.C. 33, 175 F.2d 344 (1949); *Democrat Printing Company v. Federal Communications Commission,* 91 U.S. App. D.C. 72, 75 , 202 F.2d 298, 300-01 (1952); *Saginaw Broadcasting Company v. Federal Communications Commission, supra;* and numerous others.

The Hearing Examiner, in paragraphs 15 and 16 of the Initial Decision (R. 245-246), discussed *Star of The Plains* at some length and concluded as follows:

> "It cannot either be reconciled nor construed that the six primary services available to Anadarko are a satisfactory substitute for a local facility as a means of community self-expression by Anadarko and Caddo County" (R. 246).

The Hearing Examiner, in paragraph 17, also quoted at length from the Commission's decision in *Regional Radio Service,* 32 FCC 1073, 23 RR 599 (1962), in which *Star of The Plains* was cited, in support and underscored the following clear-cut statements of the applicable fundamental principles of law:

> "The fact that applicant's proposed service area now has available at least 10 primary services does not decrease the significance of the presumption in favor of a first local outlet."
>
> * * * * *
>
> "Nor can it be said that the presumption is rebutted by the fact that two stations situated in communities 15

> miles from Rantoul provide primary service thereto. It does not follow therefrom that the local needs of Rantoul are met to the extent that a local Rantoul station would meet them."
>
> * * * * *
>
> "The Commission has held that service rendered to a community from stations located in other communities, commendable as this service may be, is not to be regarded as an adequate substitute for a local station.[5]
>
> ---
>
> "[5] **Miners Broadcasting Service, Inc.**, 23 FCC 408, 13 RR 1163 (1957); **Valley Broadcasting Co.**, 29 FCC 463 (1960), 19 RR 231; **Nick J. Chaconas**, 29 FCC 1226 (1960), 19 RR 100."

Appellant did not rely entirely upon the *Star of The Plains* opinion, however, and presented evidence which affirmatively proved that none of the six stations providing a primary service to Anadarko had ever served many of the needs of Anadarko. The Hearing Examiner made the following findings of fact:

> "15. There is evidence that there has been no programming of interest to the Indians from Anadarko; no broadcasts have been made of high school football or basketball games, American Legion baseball games, or of performances of tribal songs and music lectures concerning Indian culture. In addition the Caddo County Agricultural Agent stated that he has had difficulty in disseminating agricultural information in Caddo County because he never had access to radio facilities for such purposes. Another witness stated that he had been a State Highway patrolman in Anadarko and Caddo County and that he incurred problems in the past in advising the people of Anadarko of changes in the road conditions, such as closings or reroutings due to winter weather and storms, fires, disasters, and other such emergency situations. This witness said he knew of no instance when such information had been carried over a radio station for the benefit of Caddo County. Still another witness who had lived there for 32 years, and was manager of a retail business in Anadarko, stated that he had no access to a local radio station for advertising purposes" (R. 241-242).

The Review Board adopted those findings of fact without modification (R. 307), and then repeated the findings almost word-for-word in paragraph 4 of the majority's Decision (R. 308). Then the majority ignored its own restatement of the evidence and gave absolutely no consideration to the fundamental principles so clearly enunciated in the *Star of The Plains* and *Regional Radio Service* opinions by stating, in paragraph 7, that "Anadarko *already has six other services* available to it" (R. 309) (Italics supplied), and in paragraph 12, that "Williams' service area (rural and urban) now receives an abundance of services" (R. 311).

IV.

THE FACTS FULLY SUPPORT A WAIVER OF THE TEN PER CENT RULE AND GRANT OF THE APPLICATION

All broadcast station allocations and assignments must fulfill the mandate of Section 307(b) of the Communications Act, 47 USC §307(b):

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

"Radio service", as used in Section 307(b), comprehends both transmission service and reception service. The distinction between the two is most important and must be recognized and applied. Transmission service is the availability of a readily accessible station to provide an outlet for local self-expression, local public service, local news, local emergency bulletins, local government programs and reports, local election campaigns and returns, local youth programs, local educational programs, local religious programs, and dozens of other local programs and

services. Reception service, on the other hand, merely is the availability of a listenable signal, even from a distant station. Of the two, transmission service is far more important.[9] This basic interpretation of Section 307(b) and recognition of the all-important distinction between transmission and reception service was applied by this Court in its *Star of The Plains* opinion and has been followed by the Commission in so many decisions over the years that this brief will not be encumbered by their citations.

Since 1939, one of the tests the Commission has used to determine if the grant of an application would satisfy the "efficient" provision of Section 307(b) has been the so-called ten per cent rule, which provides that a proposed operation will be considered an efficient use of the requested channel if the interference it would receive from existing stations

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[9] Perhaps the clearest explanation is contained in a report and order of the Commission in a rule making proceeding involving the origination point of programs of broadcast stations in Docket No. 8747. In its Report and Order, 1 Pike & Fischer R.R. 91:465 [1950], at 91:466, the Commission explained as follows:

> "We have consistently held that the term 'radio service' as used in Sec. 307(b) comprehends both transmission and reception service. Transmission service is the opportunity which a radio station provides for the development and expression of local interests, ideas, and talents and for the production of radio programs of special interest to a **particular community.** Reception service on the other hand is merely the presence in any area of a listenable radio signal. It is the location of the main studio rather than the transmitter which is of particular significance in connection with transmission service. A station often provides service to areas at a considerable distance from its transmitter but a station cannot serve as a medium for local self-expression unless it provides a reasonably accessible studio for the origination of local programs.
>
> "In large portions of the United States today, reception service is reasonably satisfactory. There are many communities, however, some of considerable size, which still do not have adequate radio outlets for local self-expression. **Thus, in recent years, transmission service has become an increasingly significant factor in the application of Sec. 307(b); and a considerable number of the Commission's decisions with respect to competing applications have turned upon the question of which proposal would provide the more needed transmission service."** (Emphasis supplied.)

does not exceed ten per cent of the population in the proposed station's normally protected contour. The rule is now Section 73.28(d)(3), 47 CFR §73.28(d)(3).

A long series of opinions, both by this Court and by the Commission have held that the rule is not to be applied so rigidly that other considerations cannot control. This Court stated as follows in *Beaumont Broadcasting Corp. v. Federal Communications Commission, supra,* at page 310:

> "As for the ten per cent rule itself, the Commission has long recognized that it specifies only a norm, not a hard and fast rule. Both in authorizing and refusing to authorize departures from the ten per cent standard, the Commission has frequently stated that the governing criterion is the public interest."

In *Interstate Broadcasting Co. v. Federal Communications Commission, supra,* at page 601, this Court stated as follows:

> "Appellant next insists that the Commission is rigidly bound by the provisions of its Rule 3.28(d), [now 3.28(d)(3)] [ten per cent rule]. This rule clearly contemplates that a §307(b) finding may be made under prescribed circumstances, included as here pertinent a showing of compliance with the '10% rule,' and that '25 per cent or more of the nighttime primary service area of the proposed station is without primary nighttime service.' Appellant would have us say as a matter of law that failure in such respects is an absolute bar to a grant. In this view, it is argued that the application should have been denied outright, without more. Thus appellant would convert a mere gauge established by rule into a straight-jacket, precluding all further action. This simply is not the law, as we have previously stated."

The Commission has held in numerous decisions in recent years that the ten per cent rule is not such a hard and fast rule that waivers cannot be granted. *Minnesota Valley Broadcasting Co., Inc.,* 11 RR 1080 (1955); *Reilly and Spates, supra; Southern Indiana Broadcasters, Inc., supra; M-L Radio, Inc.,* 20 RR 942 (1960); *Hammonton Broadcasting Company, supra; Stephens County Broadcasting Co., Inc.,* 30 FCC 921,

21 RR 414 (1961); *Old Belt Broadcasting Corp., supra; Swanee Broadcasting Co.*, 21 RR 624 (1961); *Alexandria Broadcasting Corp.*, 31 FCC 755, 22 RR 411 (1961); *College Radio,* 31 FCC 897, 22 RR 679 (1961); *Greater Princeton Broadcasting Co.*, 22 RR 977 (1962); *Regional Radio Service, supra; Thomas County Broadcasting Co.*, 35 FCC 525, 1 RR 2d 376 (1963).

All opinions of this Court and decisions of the Commission have stressed that the governing criterion for waiver of the ten per cent rule has been and must be the public interest.

The Commission has recently stated once again that the purpose of the ten per cent rule is to prohibit the grant of an application where the proposed operation would "suffer interference to such an extent that its service would be reduced to an unsatisfactory degree." *Reese Broadcasting Corp., supra.*

A positive, rather than a negative, approach is required. The service which would be rendered to the public is the controlling consideration. How can the public be served by withholding service?

The frequency requested by Appellant is 540 kc, the lowest frequency in the standard broadcast band. Because the propagation of groundwave signals varies inversely with frequency, the propagation characteristics of 540 kc are the best for the entire standard broadcast band which extends to 1600 kc.[10] Because of the excellent propagation conditions, Appellant's proposed station, operating with only 250 watts power, the minimum permissible, would place a 0.5 millivolt per meter signal as far as 108 miles from its transmitter. These excellent propagation characteristics are not all the Appellant's benefit, however, because interference would be received from two other stations operating

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[10] With a minimum antenna efficiency of 175 mv/m per kw, a soil conductivity of 30 millimhos per meter, and a power of 250 watts, the 0.5 mv/m contour would fall 108 miles from the transmitter on 540 kc and only 45 miles from the transmitter on 1600 kc.

on 540 kc, one 380 miles to the southeast at Monroe, Louisiana, and the other 550 miles to the north northeast at Fort Dodge, Iowa.

The facts conclusively prove that the proposed station would not "suffer interference to such a degree that its service would be reduced to an unsatisfactory degree." No interference area would fall closer than 62 miles from Anadarko. In some directions, interference-free service would be provided to persons and areas as far as 97 miles from Anadarko. Interference-free service would be provided to 374,772 persons in an area of 21,576 square miles. Primary service of 2 millivolts per meter would be provided to every person and every city within 33 miles of Anadarko.

In addition to considering the excellent and wide-area service the proposed station would render, both the Hearing Examiner and the dissenting member of the Review Board correctly concluded, in light of both *Star of The Plains* and the uncontroverted evidence, that the distant stations, from 18 to 82 miles away, do not provide a transmission service to and satisfy the local needs of Anadarko and Caddo County. As shown in Section II of this argument, the majority of the Review Board erroneously concluded that "Anadarko *already* has six other services available to it" (R. 309) (Italics supplied), and ignored both the presumption as well as the positive evidence of need for the proposed service.

The basic objective of the Communications Act is to *provide* service. In considering waivers of the ten per cent rule, the Commission has placed great weight upon two considerations. The first is whether a first transmission service and local outlet would be provided to a community and its contiguous areas. The second is whether a reception service would be provided to an area, almost always rural, which has no or only a limited number of reception services.

Southern Indiana Broadcasters, supra, clearly demonstrates the importance of both considerations. There, the Commission granted a waiver where the interference would be 17.1 per cent with the following explanation:

> "A grant to Lawrenceville will give a first local transmission service to more people and would bring an additional reception service to a substantial number of people who now are limited to one or two primary services. The use which this applicant would make of the frequency would better achieve the purposes which regional facilities are expected to attain even though in other respects its operation would be less efficient than Southern's as evidenced by Lawrenceville's violation of the 10 per cent rule. Southern would bring a new primary service to a greater number of people than Lawrenceville, but this advantage loses some of its significance because of the availability of other services, particularly in Evansville."

Even though the term "radio service", as used in Section 307(b) of the Communications Act, comprehends both transmission and reception service, and even though it has been well settled for many years by innumerable decisions that transmission service is far more important than reception service, the majority of the Review Board refused to consider the greater importance of transmission service. In discussing the *Southern Indiana* decision, the majority of the Review Board erroneously interpreted it as holding that "[t]he establishment of a first local transmission service is an important goal, but the Commission has made it clear that service to underserved areas is an even more important goal."

In support of its erroneous interpretation of *Southern Indiana,* the majority cited in support *Basin Television Company,* 13 RR 392, 404 (1956). However, that case involved a hearing following a protest of the grant without hearing of an application of a UHF television satellite station which would not provide an outlet for local programming but would merely retransmit the programs of a distant station. The argument of the protestant was that a grant of the application would prevent establishment of a local station at some future date. Establishment of a transmission service to serve the needs of a community for local programming was not in issue in that case.

In a number of recent decisions of the Commission where waivers of the ten per cent rule were granted, neither the establishment of a first

transmission service nor the providing of a reception service to underserved areas would result. In *Old Belt Broadcasting Corp., supra,* two existing stations, which already provided transmission service to their communities, were permitted to increase power even though interference of 19.1 and 13.1 per cent would occur. In *Thomas County Broadcasting, supra,* an existing station was permitted to increase power even though interference of 16.6 per cent would occur. In *Stephens County Broadcasting, supra,* an existing station was permitted to change frequency even though interference of 11.6 per cent would occur. In *Alexandria Broadcasting, supra,* a station was permitted to increase power even though interference of 22.8 per cent would occur.

In *Pinellas Broadcasting Co. v. Federal Communications Commission, supra,* this Court stated as follows:

> "In requiring a fair and equitable distribution of service Section 307(b) encompasses not only the reception of an adequate signal but also community needs for programs of local interest and importance and for organs of local self-expression."

The ultimate test is whether the public interest will be served by the grant or denial of Appellant's application. When the first local outlet and transmission service would be provided to a city of some size and the surrounding areas which have unusual characteristics and needs, and when the station would provide primary service to wide areas from 62 to 98 miles from its transmitter, the conclusion is inescapable that the public interest, convenience and necessity can be served only by the waiver of the ten per cent rule, Section 73.28(d)(3), and the grant of Appellant's application.

V.

THE TEN PER CENT RULE, IF STRICTLY AND RIGIDLY APPLIED, MAKES IMPOSSIBLE ACHIEVEMENT OF THE OBJECTIVES OF THE COMMUNICATIONS ACT AND IS UNLAWFUL.

Section 303(r) of the Communications Act, 47 USC § 303(r), authorizes the Commission to "make such rules and regulations . . ., not

inconsistent with law, as may be necessary to carry out the provisions of this Act."

Section 1 of the Act, 47 USC §151, states that the Federal Communications Commission was created for the purpose of making ". . . available, so far as possible, to all of the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service. . . ."

As shown above, Section 307(b) of the Act directs the Commission to make a fair, efficient, and equitable distribution of radio service among the several States and communities.

If the Commission's ten per cent rule, Section 73.28(d)(3), is applied so strictly and rigidly as to make impossible the establishment of the first station which would provide not only the first station to a community of 6,299 persons and a county of 28,621 persons, but also would provide interference-free service to a wide area of more than 21,000 square miles at distances of 62 to 97 miles from the station, the rule is inconsistent with the basic objectives of Sections 1 and 303(r) of the Act, and, therefore, is unlawful.

Section 73.28(d)(3) is based upon population, not area. Population is not distributed uniformly throughout the Nation, throughout a State, or even throughout a County. An applicant for a station in a particular community which he believes needs service has no control over the population distribution, but must accept it as it exists. Whether compliance with Section 73.28(d)(3) will be achieved almost always is not under the control of the applicant.

The ten per cent rule places a most severe penalty upon applicants for stations in smaller communities, particularly those not too far distant from more densely populated areas. It is significant that every one of the decisions involving Sections 73.28(d)(3) cited in the Initial Decision and the final Decision involved small communities or communities of somewhat larger size close to major metropolitan cities. *Southern*

Indiana Broadcasters, supra, involved an application for Lawrenceville, Indiana, population 6,328;[11] *Reilly and Spates, supra,* involved an application for Bridgehampton, Long Island, New York, an unincorporated community with an estimated population of approximately 1,200; *Louis Adelman,* 28 FCC 432, 18 RR 97 (1960), involved an application for Mount Carmel, Pennsylvania, population 14,222; *Charles J. Lanphier,* 31 FCC 212, 20 RR 282 (1961), involved an application in two adjacent suburbs of Minneapolis, Minnesota, Hopkins, with a population of 7,595, and Edina, with a population of 9,744; *Hammonton Broadcasting Company, supra,* involved an application for Hammonton, New Jersey, population 8,411; *Old Belt Broadcasting Corp., supra,* involved applications for South Hill, Virginia, population 2,569, and Martinsville, Virginia, population 18,798; *Inter-Cities Broadcasting Company,* 34 FCC 751, 25 RR 404 (1963), involved an application for Livonia, Michigan, population 66,702, a suburb of Detroit, population 1,670,144, and within the same county as Detroit; *Huntington-Montauk Broadcasting Co., Inc.,* 28 FCC 689, 16 RR 192b (1960), involved an application for Deer Park, Long Island, New York, at the time an unincorporated community with a population of less than 2,500; *Stephens County Broadcasting Co., Inc., supra,* involved an application for Toccoa, Georgia, 6,781; *Alexandria Broadcasting Corp., supra,* involved an application for Morris, Minnesota, population 4,199; *Birch Bay Broadcasting Company, Inc.,* 1 RR 2d 333, involved an application for Blaine, Washington, population 1,735; and *Minnesota Valley Broadcasting Co., supra,* involved an application for Mankato, Minnesota, population 18,809.

In enacting Section 307(b), Congress recognized the need of small communities and rual areas for their own radio stations to serve their own local needs. Except for the limitations imposed by Section 73.28(d)(3), the Commission's rules are so designed as to achieve the stated objectives

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[11] Population figures are those shown in the decision or in the United States Census for either 1950 or 1960, as appropriate.

of Congress. However, as so vividly demonstrated in the preceding paragraph, Section 73.28(d)(3) places a most severe and sometimes impossible burden upon applications for small communities.

Unless one of the considerations in applying Section 73.28(d)(3) is the small size of the community and its remoteness from large centers of population, it is respectfully submitted that Section 73.28(d)(3) must be held to be an invalid exercise of the Commission's rule making authority.

CONCLUSION

For the foregoing reasons, the decision of the Commission should be set aside and reversed and the proceeding should be remanded to the Commission with instructions to grant Appellant's application and such other relief as this Court may direct.

Respectfully submitted,

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January 18, 1965.

APPENDIX

STATUTES AND RULES INVOLVED

The relevant parts of the Statutes and Rules to which references are made in Appellant's brief follow:

STATUTES

ADMINISTRATIVE PROCEDURE ACT OF 1946, 5 USC §1001, *et seq.*

Section 8.

In cases in which a hearing is required to be conducted in conformity with section 7 –

(a) Action By Subordinates. – . . .

(b) Submittals And Decisions. – Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

COMMUNICATIONS ACT OF 1934, AS AMENDED, 47 USC §151, *et seq.*

Section 1.

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Section 301.

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or

signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States, or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Section 303(r).

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall – . . .

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Section 307(b).

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

RULES

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

Section 73.28

Assignment of stations to channels.

. . . (d) With respect to applications for new Class II-A stations and other applications accepted for filing before July 13, 1964, the following shall apply: Upon showing that a need exists, a Class II, III, or IV station may be assigned to a channel available for such class, even though interference will be received within its normally protected contour, subject to the following conditions: . . . (3) The interference received does not affect more than 10 per cent of the population in the proposed station's normally protected primary service area; however, in the event that the nighttime interference received by a proposed Class II or III station would exceed this amount, then an assignment may be made if the proposed station would provide either a standard broadcast nighttime facility to a community not having such a facility or if 25 per cent or more of the nighttime primary service area of the proposed station is without primary nighttime service. This subparagraph (3) of this paragraph shall not apply to existing Class IV stations on local channels applying for an increase in power in excess of 250 watts with respect to population in the primary service area outside the equivalent 250 watt, 0.5 mv/m contour.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,943

JAMES R. WILLIAMS,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM A DECISION AND ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

HENRY GELLER,
General Counsel,

JOHN CONLIN,
Acting Associate General Counsel,

HOWARD JAY BRAUN,
Counsel.

Federal Communications Commission
Washington, D.C. 20554

STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to by the parties in a stipulation approved by the Court on November 16, 1964, are as follows:

1. Whether the Commission's reference to the failure of Appellant to submit evidence concerning his proposed program service was prejudicial in light of an earlier Commission ruling that addition of an issue concerning Appellant's proposed program service was not justified.

2. Whether the Commission properly weighed and considered all of the relevant and material evidence concerning the unique Indian characteristics, population and institutions of Anadarko and the surrounding area, the need for a local radio service, and the absence of any meaningful program service from any existing station.

*3. Whether the Commission erred by refusing to set aside the ruling of the Hearing Examiner rejecting evidence offered for the purpose of supporting a waiver of Section 73.28(d)(3) of its Rules, the so-called "10% Rule."

4. Whether the Commission erred by failing to grant a waiver of Section 73.28(d)(3) of its rules.

5. Whether Section 73.28(d)(3) of the Commission's Rules, as interpreted and applied in this proceeding, violates the basic purposes for which the Commission was created and various provisions of the Communications Act of 1934, as amended, including Sections 301, 303, and 307(b).

* Appellant has not presented any argument on this question.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Cases chiefly relief upon are marked with an asterisk.

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Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM A DECISION AND ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), from a Decision of the Review Board (Board) of the Federal Communications Commission, released January 20, 1964 (R. 307-318),[1/] a Memorandum Opinion and Order of the Board released April 15,1964, denying reconsideration (R. 350-351), and an Order of the Commission released September 8, 1964, denying an application for review of the Board's decision herein (R. 385). The Decision denied the application of James R. Williams (Williams) for a construction permit for a new Class II standard broadcast station to operate on the frequency 540 kc, with 250 watts power,[2/] daytime only,

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1/ Under Section 5(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 155(d)(3), a decision of the Review Board has the same force and effect as a decision of the Commission, unless it is reviewed by the Commission.

2/ Class II stations may have power ranging from 250 to 50,000 watts. See Section 73.182(a)(2) of the Rules, 47 CFR (1964 ed.) 73.182(a)(2).

at Anadarko, Oklahoma.

Appellant's statement of the case is somewhat argumentative. It is believed that a more complete statement of the case will be helpful to the Court.

By Order released May 14, 1962, Williams' application was designated for consolidated hearing with the application of Harwell V. Shepard, tr/as Olney Broadcasting Company (Olney) (R. 81-83).[3/] The Commission's Order of May 14, 1962 found both Williams and Olney to be legally, financially, technically, and otherwise qualified to operate the proposed stations, except as to a number of specified issues of which the following remain relevant to this appeal:

* * *

> 2. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and the interference that each of the instant proposals would receive from all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
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> 3. To determine whether the instant proposal of James R. Williams would cause objectionable interference to Stations KWMT, Ft. Dodge, Iowa and KNOE, Monroe, Louisiana, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
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> 4. To determine whether interference received from existing stations would affect more than ten percent of the population within

3/ Subsequently, by Memorandum Opinion and Order released April 24, 1963, the Commission dismissed Olney's application (R. 127).

> the normally protected primary service area of the instant proposal of James R. Williams, in contravention of Section 3.28(d)(3) of the Commission Rules, [Now Section 73.28(d)] and, if so, whether circumstances exist which would warrant a waiver of said Section.

* * *

On June 1, 1962, Olney requested that the issues be enlarged to include an issue on whether the program service proposed by Williams was designed for and would in fact meet the needs of the Anadarko community (R. 88-91). Olney did not contest the substance of the programming itself, but alleged that the proposal was essentially a copy of one that Williams had previously filed in an application for a standard broadcast station at Winfield, Kansas, thus raising a question as to its suitability for an entirely different community.[4/] Noting that the original program proposal had since been modified, the Commission stated (R. 114-115):

> It is the amended programming proposal that we are concerned with, and it has been shown that the programming proposal as amended by right, pursuant to 47 CFR 1.311(a), is not a duplicate of that for Winfield. Furthermore, the instant proposal was made, as is shown by uncontroverted affidavit, after a survey of community needs and it is represented that such surveys will continue. An issue, such as is requested here, where the applicant is engaging in a continuing effort to ascertain the needs and interests of its area, is not justified, WSTE-TV, Inc., FCC 62-583 (1962). Therefore the request will be denied.

Hearing sessions were held on November 26 and December 20, 1962 (Tr. 7-40)[5/] and the record was closed on May 2, 1963.

4/ Cf. Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), cert. denied 371 U.S. 821 (1962).

5/ The "Tr" prefix to a record reference is to the original pagination of the hearing transcript. These transcript pages have not been renumbered in the record.

At the hearing it was established that Williams' proposal would provide a first transmission service to Anadarko, Oklahoma, the county seat of Caddo County (R. 242),[6/] and would also provide a new broadcast service to 374,772 persons. It was also found that the proposed station would cause co-channel electrical interference to the normally protected service areas[7/] of radio station KWMT, Fort Dodge, Iowa, and radio station KNOE, Monroe, Louisiana, affecting 0.6 and 2.3 percent respectively, of the population within such areas (R. 243). Both interference areas receive service from at least 12 other existing stations. Under the circumstances the examiner concluded that "standing alone," this loss of service would not preclude favorable action on the application since a grant would make possible a first transmission facility in Anadarko.

6/ Anadarko and Caddo County have populations of 6,299 and 28,621, respectively. The examiner also found that Anadarko now received primary service (2 mv/m or greater) from 6 stations, and that all urban communities which would be served by Williams' proposed station received primary service from at least 5 other existing stations, while the rural communities to be served received between 14 - 22 other broadcast services (R. 240).

Primary service means service of a specified signal intensity (depending upon the nature of the area to be served), and not subject to objectionable interference or objectionable fading. See Section 73.11(a) of the rules, 47 CFR (1964 ed.) 73.11(a).

Section 73.182 of the rules, 47 CFR (1964 ed.) 73.182, defines primary service for urban residential areas as a signal of at least 2.0 mv/m, while a signal strength of 0.5 mv/m is generally considered adequate for primary service to rural areas.

7/ The normally protected service area of a standard broadcast station is described in Beaumont Broadcasting Corp. v. Federal Communications Commission, 91 U.S. App. D.C. 111, 115, 202 F.2d 306, 309 (1952) as follows:

> ". . . each standard radio broadcasting station normally enjoys freedom from objectionable electrical interference up to a point where its broadcast signal is of a designated strength. The imaginary line connecting all of these points in every direction around a station is called the station's 'normally protected contour.'"

The evidence also established, however, that Williams' proposed station would receive objectionable interference from three other broadcast stations affecting 73,772 persons, which represented 16.4 percent of the population within Williams' normally protected service contour (R. 242-243). This population loss exceeded the 10 percent maximum allowed by Section 73.28(d)(3) of the Commission's Rules, 47 CFR (1964 ed.) 73.28(d)(3),[8/] thus placing the application in violation of the Rule. The hearing examiner concluded that a waiver of the ten percent rule was warranted in view of the fact that Anadarko and Caddo County were without a local radio station and accordingly, granted Williams' application (R. 250).

Exceptions to the Initial Decision were filed by Williams (R. 252-255) and the Broadcast Bureau (R. 262-266), and a reply brief was filed by Williams (R. 275-281). Although supporting the result reached by the examiner, i.e. that the establishment of a first local service justified a waiver of the ten percent rule, Williams urged as an additional ground for waiver, among other things, that Anadarko was an unusual community with unique needs. The Broadcast Bureau, on the other hand, contended that the evidence did not justify a waiver

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8/ Section 73.28(d)(3) provides in pertinent part:

> "(d) Upon showing that a need exists, a Class II, III, or IV station may be assigned to a channel available for such class, even though interference will be received within its normally protected contour; Provided:
>
> * * * *
>
> (d) the interference received does not affect more than 10 percent of the population in the proposed station's normally protected primary service area; . . . . "

of the rule. The Commission's Review Board heard oral argument on November 26, 1963 (Tr. 41-64), and released its Decision on January 20, 1964, adopting the examiner's findings of fact but reaching a different ultimate conclusion (R. 307-318).[9/]

The Review Board held that the Williams' proposal violated the ten percent rule, but did not believe that Commission precedent warranted a waiver of the rule and a grant of the Williams' application. It agreed with the examiner that the main question in this case was " . . . whether an area consisting of a town embracing 6,299 persons in a county of 28,621 in Southwest Oklahoma should have its first radio outlet despite the recognized interference involved." The Board stated that while the rendition of a first local transmission service to a community was a relevant factor in determining whether a waiver of the ten percent rule was justified, this fact by itself, was not sufficient to automatically justify a waiver of the rule. The Board noted that on several occasions, the Commission had denied applications proposing to bring a first local service to a community where the proposal violated the 10 percent rule, Louis Adelman, 28 F.C.C. 432, 18 Pike & Fischer, R.R. 97 (1960), Inter-Cities Broadcasting Co., 34 F.C.C. 751, 25 Pike & Fischer, R.R. 404 (1963), and pointed out that where the rule had been waived in such cases, additional favorable factors were present and had been relied on.

In this regard, the Board noted that Anadarko already received

9/ The Review Board denied the Williams' application by a 2-1 vote. Board member Nelson wrote a dissenting statement.

service from six other broadcast stations, and all areas proposed to be served by Williams presently received broadcast services from numerous other stations (R. 309).[10/] This was contrasted with Southern Indiana Broadcasters, 24 F.C.C. 521, 15 Pike & Fischer, R.R. 349 (1958), a case where a waiver was granted on a showing that in addition to bringing a first local station to the community, a reception service would be provided to a large number of people who then received service from only one or two other stations and no interference would be caused to existing facilities.

The Board recognized that in some instances the Commission had granted waivers of the ten percent rule based, in part, on the fact that the proposed station would meet certain unusual needs of the area to be served. It fully considered Williams' contentions in this regard but concluded that he had not satisfactorily shown that Anadarko or the wide area to be served, especially the latter, had any special needs, or that Williams' proposed programming was designed to meet any special needs (R. 311). The Board stated:

> "* * * Regarding the needs of its Indian population, the only evidence submitted by Williams were affidavits of the Area Director for the Anadarko Area, Bureau of Indian Affairs, and an Anadarko resident who stated that, so far as they knew, there were no broadcasts of announcements of gatherings held by Indian groups or of performances of tribal songs, music or lectures concerning Indian culture.6/ No concrete evidence was submitted, however, as to the number of Indians residing in the Anadarko area, what special needs these persons have, or how Williams proposes to satisfy these needs. Aside from the attempt to show Anadarko as a center of Indian culture, no showing was made of any other unusual needs that would not be present in most cities lacking a transmission service.7/"

6/ No effort was made to show whether or not nearby stations have, in fact, carried programs of this nature.
7/ Unlike the Alexandria case, supra, Williams did not establish the existence of any severe or unusual weather conditions.

10/ See footnote 6, supra.

On February 20, 1964, Williams filed a petition for reconsideration of the Board's decision (R. 319-336). An Opposition was filed by the Broadcast Bureau on March 4, 1964 (R. 337-343). The Board denied Williams' petition in a Memorandum Opinion and Order released April 16, 1964 (R. 350-351). Subsequently, Williams filed an application for review with the Commission, pursuant to Section 1.115 of the Commission's rules, 47 CFR (1964 ed.) 1.115,[11/] which was denied in an Order released on September 8, 1964 (R. 385). This appeal followed.

11/ Section 1.115 of the Commission's Rules provides in pertinent part that, "any person aggrieved by any action taken pursuant to designated authority may file an application requesting review of that action by the Commission."

SUMMARY OF ARGUMENT

I.

Section 73.28(d)(3) of the Commission's Rules (47 CFR 73.28(d)(3)), the so-called "10% Rule", provides in pertinent part, that a proposal which receives interference affecting more than 10% of the population residing within its normally protected service area will not be granted because it represents an inefficient use of a broadcast frequency. This Court has held that the 10% Rule is a valid and proper exercise of the Commission's power, and that absent a waiver, failure of an applicant to meet the requirements of the rule is equivalent to a disqualification. Guinan v. Federal Communications Commission, 111 U.S. App. D.C. 371, 297 F.2d 782 (1961). Whether or not a waiver of the 10% Rule should be granted is a matter within the Commission's administrative discretion, and absent any arbitrary action by the Commission, the Court should not substitute its judgment in such a technical matter for that of the expert agency. Sunshine State Broadcasting Co., Inc., v. Federal Communications Commission, 114 U.S. App. D.C. 271, 314 F.2d 276 (1963).

All the matters asserted by appellant in support of a waiver of the rule were fully considered by the Review Board and appellant has failed to show that the Board's rejection of them constituted an abuse of discretion. The Board properly concluded that the only significant factor which appellant established in support of a waiver was that his proposal would provide a first local transmission service

to Anadarko, Oklahoma. However, this factor alone had not constituted grounds for waiver in the past, nor in the Board's judgment did it now, especially in view of the inefficiency of appellant's proposal, the fact that it would cause interference to two other stations, and that the proposed service area already received a plethora of other services. In short, in the Board's judgment, no showing of any exceptional circumstances warranting a waiver of the 10% Rule had been shown.

II.

Although appellant contends in support of a waiver of the 10% Rule, that Anadarko has a unique need for a local radio station due to its "Indian characteristics," the Review Board properly held that appellant failed to show that Anadarko or the wide area to be served had any special needs, or that his proposed programming was designed to meet special needs. As the Board indicated, appellant's showing here was no different from that which would be present in most cities lacking a transmission service. Cf. Sayger v. Federal Communications Commission, 114 U.S. App. D.C. 112, 312 F.2d 352 (1962).

Similarly, the Board properly held that appellant failed to demonstrate that his proposed programming was designed to meet any special needs of the Anadarko area, although under the specified issues in the hearing he had had an opportunity to do so. Huntington-Montauk Broadcasting Co., Inc., 25 F.C.C. 1309 (1958).

Also, contrary to appellant's assertions, the Board made no assumption that the six broadcast stations from which Anadarko now receives service were meeting the local program needs of Anadarko. Cf. Harrell v. Federal Communications Commission, 105 U.S. App. D.C.

352, 267 F.2d 629 (1961). In considering these services, the Board was simply distinguishing the facts of this case from Southern Indiana Broadcasters, 24 F.C.C. 521 (1958), a case relied upon by appellant in support of a waiver but where there were fewer reception services available.

And, finally, the Review Board in no way departed from prior Court and Commission decisions dealing with the "10% Rule." The Board evaluated appellant's request for waiver according to its own particular facts and appellant has not demonstrated that the Board's judgment was unreasonable or arbitrary. Guinan v. Federal Communications Commission, supra. Accordingly, the Review Board's Decision and Order should be affirmed.

ARGUMENT

I. THE "10% RULE" REPRESENTS A PROPER EXERCISE OF ADMINISTRATIVE DISCRETION, AND WHETHER OR NOT THE RULE SHOULD BE WAIVED IS FOR THE JUDGMENT OF THE COMMISSION.

Appellant's challenge to the Board's decision on the merits and to its refusal to order a rehearing, revolves primarily about Section 73.28(d)(3) of the Commission's Rules. This section was incorporated into the rules (as Section 3.28(c), now Section 73.28(d)) after a formal rule-making proceeding in 1954. See Report and Order of August 4, 1954, In the Matter of Amendment of Section 1 of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations, 10 Pike & Fischer, R.R. 1595. The thrust of the rule is that, with certain exceptions not relevant here, a proposal which receives interference affecting more than 10% of the population residing within its normally protected primary service area will not be granted, because it represents too inefficient a use of the frequency. 12/

12/ The 1954 Report and Order explained the considerations which are basic to the rule as follows: (10 Pike & Fischer, R.R. at 1597):

> Whenever two or more radio stations operate simultaneously on the same or closely adjacent frequency, each will interfere to some extent with the reception of the other. Depending upon many factors but principally upon the distance between the stations, the powers radiated and the time of operation, the interference may be so slight as to be undetectable or may be so severe as virtually to destory the entire service areas of all the stations. The fundamental judgment which must be made by the Commission in formulating the rules governing station assignments is the determination of the point at which on an over-all basis the resulting interference may become so severe as to outweigh the advantages to be gained by assigning additional stations to the available frequencies. Basic engineering rules governing

(cont'd)

Before the 10% rule was promulgated, the Commission's Standards of Good Engineering Practice, 47 CFR (1953 ed.) 172, which were intended to be flexible, had contained the 10% provision, but the standard was "only a norm, not a hard and fast rule." Beaumont Broadcasting Corp. v. Federal Communications Commission, 91 U.S. App. D.C. 111, 115-116, 202 F.2d 306, 309 (1952). In its rule-making report the Commission stated (10 Pike & Fischer, R.R. at 1598):

> "The present proposal is designed to codify the important exceptions developed in the administration of the 10% rule so as to establish a fixed certain procedure."

The 10 percent requirement was made "chiefly so as to insure an efficient utilization of available facilities. For if the sole criterion were only 'no interference to existing stations,' a grant might be made which represented a markedly inefficient operation and which might preclude some future assignment of a much more efficient nature." The Commission also pointed out that the 10% requirement has the effect of protecting the service of existing stations against degradation, since adding substantial numbers of stations to any channel has an adverse effect even though objectionable interference is not caused. (10 Pike & Fischer, R.R. 1598 fn. 2).

This Court has held that the adoption of the rule was "a proper, indeed a necessary, exercise and implementation of the power committed to [the Commission] in the Communications Act," and that

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12/ (cont'd) the assignment of stations are, in essence, a means for achieving an optimum balance between excessive interference and too restricted use of available frequencies.

"in the absence of a waiver, failure to meet the rule's requirements is equivalent to disqualification," Guinan v. Federal Communications Commission, 111 U.S. App. D.C. 371, 374, 297 F.2d 782, 785 (1961).[13/] In this connection, the Commission emphasized in 1954, when it inserted the 10% requirement in the Rules and Regulations, that petitions for waivers of the requirements of the rule would be given favorable consideration "only in unusual circumstances in which it is clearly demonstrated that the public interest requires such exceptional action" (10 Pike & Fischer, R.R. at 1600 fn. 4).

Whether or not a waiver of the rule should be granted is as this Court has consistently held, a matter "committed factually to the discretion of the Commission," Guinan v. Federal Communications Commission, supra. And in a more recent case involving the same question the Court stated:

> The question whether in a given case a waiver of the ten percent rule would be in the public interest is,

13/ Appellant argues (Br. 28-31) that if the 10% rule is to be applied to prohibit a grant of his application, it is an unlawful exercise of the Commission's rule making authority because it allegedly penalizes applicants proposing to establish a first station in small communities and rural areas. This argument we submit is foreclosed by Guinan, supra, 111 U.S. App. D.C. 371, 374, 297 F.2d 782, 785 (1961) and Sunshine State Broadcasting Co., Inc. (WBRD) v. Federal Communications Commission, 114 U.S. App. D.C. 271, 273, 314 F.2d 276, 278 (1963) wherein the Court said:

> "Appellant also says the ten percent rule is unduly restrictive and should be abandoned in favor of a new criterion. Whether so or not is a matter for the Commission to determine."

> we think, one which is to be answered by the Commission which has the expertise essential to its determination. The Court should not substitute its judgment in such a technical matter for that of the expert agency, unless it appears that it has acted arbitrarily. Sunshine State Broadcasting Co. v. Federal Communications Commission, 114 U.S. App. D.C. 271, 273, 314 F.2d 276, 278. (1963). 14/

These cases are, we believe, dispositive of the issues raised by this appeal. The Commission's Review Board fully considered the matters asserted in support of a waiver, and appellant has failed to show that their rejection by the Board constituted an abuse of discretion.

As the Board concluded, the only significant factor which appellant established in support of waiver was that his proposal would provide a first local transmission service to Anadarko. But, this element, absent more, has not in the past constituted grounds for waiving the rule, 15/ and in the Board's judgment a waiver was not warranted here. Appellant's proposal would receive interference affecting 16.4% of the population within its normally protected contour (more than 1-1/2 times the amount of interference permitted by the rules), and would cause interference to two existing stations. Also, as the Board pointed out, Williams' proposed service area already received an abundance of other radio services and therefore,

14/ See also Sayger v. Federal Communications Commission, 114 U.S. App. D.C. 112, 312 F.2d 352, (1962).
15/ See Mitchell Broadcasting Co., 2 Pike & Fischer, R.R. 2d 365 (1964); The Greenwich Broadcasting Corp., 2 Pike & Fischer, R.R. 2d 548 (1964); Inter-Cities Broadcasting Co., 34 FCC 751 (1963); Louis Adelman, 28 FCC 432 (1960), aff'd sub nom. Guinan v. Federal Communications Commission, supra.

could not be considered an underserved area (R. 311).[16/] Thus, weighing the desirability of establishing a local station in Anadarko against the standard of efficiency in the utilization of radio frequencies that is embodied in the rule, the Board reached the entirely reasonable judgment that the exceptional circumstances necessary to justify a waiver of the rule had not been shown and that, accordingly, adherence to the rule was warranted.

The conclusion represents a wholly permissable exercise of the broad discretion which, as the above-cited cases recognize, has been granted to the agency in matters of this kind. Its decision should accordingly be affirmed.

16/ The Review Board stated (R. 308):

> "All urban communities of 2,500 persons or more, which would be served by the proposed station, presently receive primary service (2 mv/m or greater) from at least 5 stations. All rural parts that would be served now receive at least 14 services and some parts have as many as 22 services."

II. IN REACHING ITS DETERMINATION THAT A WAIVER OF THE 10% RULE WAS NOT WARRANTED, THE REVIEW BOARD PROPERLY WEIGHED AND CONSIDERED ALL THE RELEVANT EVIDENCE IN THIS CASE.

Appellant's Points I-III (Br. 14-22) challenge basic findings of fact and conclusions which the Board relied upon in reaching its determination. We think it clear, however, that the Board committed no prejudicial error in its evaluation and consideration of all the relevant and material facts in this case, and that it was completely justified in denying Williams' application on the grounds that Williams put forth no evidence indicating overwhelming public interest considerations warranting a waiver of the 10% rule.

A. The Review Board Properly Determined That Appellant Made No Showing Of Any Unusual Needs Of The Anadarko Area Due To Its Indian Population.

The Commission has in some instances granted waivers of the 10% rule, based in part, on the fact that a proposal would meet certain unusual or exceptional needs of the proposed service area. Stephens County Broadcasting Co., 30 FCC 921 (1961); Alexandria Broadcasting Corp., et al., 31 FCC 755 (1961). Appellant contends that although its proposal would not serve 16.4% of the population within its normally protected service area, and would also cause interference to two existing broadcast stations, nonetheless, the 10% rule should be waived inasmuch as Anadarko has a unique need for a local radio station due to its "Indian characteristics." But in the judgment of the Board, appellant failed to show that Anadarko or the wide area to be served had any special needs, or that his proposed pro-

gramming was designed to meet special needs (R. 311). In reaching this conclusion, the Board carefully considered all the evidence submitted and specifically stated in its decision where it felt Williams' showing was deficient. (R. 308, 311, Counterstatement p. .) The Board particularly emphasized that no evidence was submitted by Williams concerning the number of Indians residing in the Anadarko area, the alleged "special needs" of this group of how Williams' proposed programming was designed to satisfy those needs.

The Board acknowledged that two affidavits in the record indicated that no announcements were broadcast dealing with the activities of local Indian groups, but presumably many other groups in the community could advance the same claim, since Anadarko has no local facility. Essentially, as the Board pointed out, the showing of need here was really no different from that which would "be present in most cities lacking a transmission service." (R. 311). And in this connection, this Court has held, Sayger v. Federal Communications Commission, 114 U.S. App. D.C. 112, 116-117, 312 F.2d 352, 356-357, that while "any community which does not have a local station needs one day and night," a refusal to waive the 10% rule in order that the need may be met will not be set aside, since "the delicate balance in the public interest to be achieved by the assignment of radio frequencies is a matter committed to the expertise of the Commission."

Appellant maintains that the Board erred in stating that evidence was lacking as to the number of Indians and their special

needs, and refers to the following evidence of record as establishing the number of Indians in the area to be served:

> "Of a total number of 36,877 Indians under the guidance of the Anadarko Area Office, 21,611 still live on the former allotment" (R. 172).

But these figures are not meaningful in terms of the population residing within the proposed interference-free service area. For other evidence clearly shows that the Anadarko Area Office, Bureau of Indian Affairs, supervises Indian activities in the entire western portion of Oklahoma, an area far greater than that which would be served by appellant's proposed station (R. 171-172). And, in fact, when the very exhibit on which appellant relies was admitted into evidence it was noted that the number of Indians residing in the proposed service area was not shown. The exhibit was accordingly admitted with the qualification that it did not establish that Williams' proposed operation would serve all the tribes of Western Oklahoma. (Tr. 12-16, 55, 58, R. 171-178).

Assuming, arguendo, that these figures may nevertheless have some relevance it should not noted that this population represents only a small portion of the nearly 375,000 people residing in the proposed primary service area, considerably lessening appellant's claim that there is a unique need for the station arising from the unusual ethnic character of the area.[17/]

17/ The 1960 United States Census records reveal that 10.8% of Caddo County's residents are Indians. 1 1960 Census of Population, part 38 (Oklahoma) 38-114. With respect to the number of Indians among Anadarko's 6,299 persons, the statistics given are based upon the following classification: "white", "negro" and (cont'd)

Appellant has directed the Court's attention (Br. pp. 16-17) to certain other record evidence (R. 157-166, 171-178, 184-189) allegedly overlooked by the Board, which it is claimed establishes the special nature of the area to be served. This material, however, contains no specific allegations concerning any unique or unusual needs of Anadarko's minority Indian population. At best, the exhibits in question contain only historical and geographical facts relating to Anadarko itself, the various Indian tribes in the western part of the state, and statements of local residents concerning Anadarko's need for a local broadcast outlet. The Examiner's findings based on these exhibits were expressly adopted by the Board, but in its judgment they did not constitute a substantial enough showing of exceptional or unique needs to warrant a waiver of the 10% rule. And, in this connection, it should be noted that the Examiner too, attached little weight to this material, recommending a waiver not on the ground that there was a special need arising from the Indian culture of the area, but simply because, Anadarko and the county in which it was located had no local station.

In short, appellant's dispute is not with the Board's findings or its alleged failure to consider the evidence, but rather with the Board's judgment based on the findings and the evidence. Appellant has failed to show, however, that the conclusion reached by the Board is unreasonable or otherwise beyond the scope of its discretion.

17/ (cont'd) "other races" (which presumably includes Indians). The number of persons listed under "other races" for Anadarko is 821 persons or 13% of that community's population. Id. at 38-60. Even assuming arguendo that "other races" are all Indians by no stretch of the imagination can 13% of the population be considered as proof that the general character of the Anadarko area is Indian, or that the special needs of the community are predominantly Indian. As we have indicated, Williams submitted nothing on this point.

B. The Review Board Properly Held That Appellant Failed To Demonstrate That His Proposed Programming Was Designed To Meet Special Needs Of The Anadarko Area.

In reaching its conclusion that a waiver of the 10% rule was not warranted in this case the Board, among other things, noted that appellant had failed to demonstrate how his proposed programming was designed to meet the alleged special needs of the Anadarko area (R. 311). Appellant now argues that in the absence of a specific programming issue in the hearing it was erroneous for the Board to comment upon and give weight to the absence of programming evidence in the record (Br. 17-19). The assertion is also made that the failure of the Commission to include a program issue indicates that any question of programming must have been resolved by the Commission in his favor. Both of these contentions are plainly erroneous.

In the Commission's Order designating the application for hearing, the Commission found Williams to be basically qualified except with respect to certain technical issues which were specifically delineated (R. 81). This determination simply meant that were it not for the designated issues, appellant's application would be granted inasmuch as the data submitted, including the programming proposal, raised no questions concerning appellant's basic qualifications to be a licensee. Communications Act of 1934, as amended, Section 309(a)(e), 47 U.S.C. 309(a)(e). Nothing whatever in the order suggests that a determination had been made that appellant's proposed programming was especially designed to meet the

allegedly unique needs of the Anadarko area or its Indian population, which might warrant a waiver of the 10% rule. Indeed, at the time the hearing order was entered appellant's contention that the unique needs of the service area justified a waiver of the rule had not yet been made.

Again, appellant misinterprets the Commission's holding when it urges that the Commission's denial of a petition to enlarge issues in this case and to add a programming issue against appellant, constituted an affirmative finding that program evidence need not be adduced in support of the requested waiver.[18/] The issue before the Commission at the time was whether, in light of an allegation that appellant's proposed program schedule was virtually identical with one he had filed for a station at Winfield, Kansas, he had "demonstrat[ed] an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them", Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 260, 302 F.2d 191, 194 cert. denied 371 U.S. 821 (1962). The Commission denied the petition because it was satisfied on the basis of the information before it that the applicant had shown himself generally familiar with the area (R. 114-115). But whether or not the area possessed unique characteristics requiring specialized programming to which the applicant's proposal was particularly geared and whether this constitutes a ground for waiver of the rule are separate matters which were simply not before the Commission at

18/ See Counterstatement p. 7 .

the time and on which the order in question did not presume to pass.[19/]

Commission policy with regard to the introduction of this kind of evidence, however, is clear. In Huntington-Montauk Broadcasting Co., Inc., 25 FCC.1309 (1958) the Commission stated at pages 1318-1319:

> Therefore, the question whether programming evidence is admissible to help establish grounds for waiving the restrictions of the '10 percent rule' is squarely presented. The Commission agrees with the examiner that such evidence is admissible; a question of waiver of the rules is at issue, and, this being so, considerable latitude as to the type of evidence to be introduced in an effort to sustain the proposition must be permitted. The intention of the Commission in this regard is indicated by the broad language of issue 3 which contemplates an inquiry to determine 'whether circumstances exist which would warrant a waiver.' This ruling does not mean that the Commission believes that in any situation short of one involving very unusual circumstances the facts based on such evidence will have any appreciable decisionable significance in deciding whether waiver is warranted. The ruling means only that programming evidence introduced in support of a request to waive the provisions of the 10 percent rule is not irrelevant or immaterial and is, therefore, admissible if introduced in a competent manner.

See also Mitchell Broadcasting Co., 2 Pike & Fischer, R.R. 2d 365 (1964).

Thus, the issue as specified at the hearing, allowing the applicant to show "whether circumstances exist which would warrant a waiver," clearly afforded the appellant opportunity to come forward

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19/ Cf. Interstate Broadcasting Co., Inc. v. Federal Communications Commission, 105 U.S. App. D.C. 224, 265 F.2d 598 (1959) where a specific hearing issue relating to Section 307(d) of the Communications Act was deleted but the Commission's action granting the application under the "fair, efficient and equitable standard" of Section 307(d) was upheld.

with programming evidence. The Board's observation that he failed to do so is hardly prejudicial error but, on the contrary, is an entirely fair and accurate appraisal of the record on this point.

C. The Review Board Made No Assumption That The Six Broadcast Stations From Which Anadarko Now Receives Service Were Meeting The Local Program Needs Of Anadarko.

Appellant maintains (Br. 19-22), that the Board erroneously assumed and concluded, contrary to Harrell v. Federal Communications Commission, 105 U.S. App. D.C. 352, 267 F.2d 629 (1961), that six distant radio stations, already providing a primary reception service to Anadarko, were also providing a local program service to Anadarko. This argument is predicated upon a misconception and misinterpretation of a portion of the Board's decision in this case. While the Board clearly recognized that Anadarko had no local broadcast station meeting the program needs of the community, and considered this factor relevant in its determination of whether waiver of the 10% rule was warranted, the Board also correctly noted that this factor alone would not justify a grant of Williams' application. The Board then went on to compare the facts of this case, with those of Southern Indiana Broadcasters, 24 F.C.C. 521 (1958). While both cases had certain similarities, the distinguishing feature between them was the fact that, in addition to providing a first local transmission facility to the community of Lawrenceville, Illinois, the proposal in Southern Indiana would also provide a second primary reception service to 12,378 persons and a third reception service

to the community of Lawrenceville itself. By contrast, the Board pointed out that Anadarko received six other broadcast services and that the proposed service areas presently received numerous other reception services.[20/] A similar situation existed in Inter-Cities Broadcasting Co., 34 F.C.C. 751 (1963), a case cited by the Board as a precedent for denying a request to waive the rule. Thus the Board was simply noting that where the Commission had found Lawrenceville to be an underserved area in terms of available reception services and relied on this fact as one reason for waiving the rule in that case, no such considerations were present here. But this is quite different from concluding, as appellant contends the Board did, that Anadarko's transmission needs, i.e., the needs of the community for local self-expression, were satisfied by the six radio services. Nowhere in the Board's decision was such a finding made or even implied.

In short, the Board clearly recognized Anadarko's need for its first local station, but made clear that this fact, considered in light of Williams proposed inefficient operation and the abundence of service already available, did not justify a grant of its application.

20/ The Board emphasized in a later paragraph (R. 310) that radio service to underserved areas was ordinarily considered a more important goal than the establishment of a first local transmission service and that this factor, while present in Southern Indiana, supra, was lacking here. See Basin Television Company, 13 Pike & Fischer, R.R. 392, 404 (1956).

D. The Review Board Properly Construed Prior Court And Commission Decisions Dealing With The "10% Rule."

Appellant argues at some length (Br. 23-28) that under previous decisions applying the "10% Rule," a waiver of the rule was justified here. This discussion is, we think, largely irrelevant since the issue before the Court is whether a refusal to waive the rule was arbitrary, not whether a grant might have been justified.

This Court has acknowledged that the Commission may properly "tak[e] a pragmatic approach in evaluating each requested waiver according to its own particular facts," Guinan v. Federal Communications Commission, supra at 374-375, 295 F.2d at 785-786. This, we submit is precisely what the Board did here, and since its judgment has not been shown to be unreasonable, its action should be affirmed. In any event, however, we submit that the result it reached is not inconsistent with prior actions involving the "10% Rule."

Appellant relies on four Commission decisions where a waiver of the 10% rule was granted but where the proposals did not provide the establishment of a first local transmission facility. Neither of these cases aids appellant's position and in all four of these cases waiver was granted because of unusual circumstances noticeably absent in this case. In Old Belt Broadcasting Corp., 20 Pike & Fischer, R.R. 1035 (1961), the Commission waived the 10% rule although interference of 19.1 and 13.1% would occur

because it found inter alia, that no one receiving primary service from the two stations seeking higher power (WJWS, South Hill, Virginia, and WHEE, Martinsville, Virginia) would lose such service as a result of the proposed power increases, and the two stations would cause interference only to each other and each had agreed to accept the others interference. The Commission waived the 10% rule in Thomas County Broadcasting Co., Inc., 35 F.C.C. 525 (1963), although the station would receive interference affecting 16.6% of the persons within its normally protected contour because station WKTG, Thomasville, Georgia, operating as proposed, would be improving its facilities to the maximum permitted, 47 CFR 73.25(d), thus enhancing optimum utilization of the frequency 730 kc. Also, the interference which would be received was no greater than that which the station's existing operation already received, and the station would be extending its service to substantial areas and populations, some of whom had only two primary services. In Stephens County Broadcasting Co., 21 Pike & Fischer, R.R. 414 (1961), the application of WNEG, Toccoa, Georgia, for a frequency change and reduction of power was granted although 11.6% of the population within the station's normally protected contour would not receive service, since station WNEG broadcast daily livestock, poultry and agricultural quotations to the area in which Toccoa is the manufacturing, trade, and service center, and the applicant proposed to extend this service to other nearby areas. And finally, Alexandria Broadcasting Corp., 22 Pike

& Fischer, R.R. 411 (1961) is readily distinguishable from this case. Waiver was granted in that case even though 22.8% of the population within the station's protected service area would receive interference, inasmuch as the station proposed to broadcast weather information to Morris, Minnesota, a community which was subjected to severe winters with numerous snowstorms as indicated by the record.

In sum, we submit that the Board's decision to deny Williams' application because of a 16.4% interference loss, is not unreasonable or arbitrary in light of its decisions in other cases and the policy underlying the 10% rule. Williams' arguments amount at most to a contention that the Board might also have acted reasonably if it had determined to waive the rule. Yet such a contention is inadequate to secure a reversal of the Board's decision. Guinan v. Federal Communications Commission, 111 U.S. App. D.C. 371, 375, 297 F.2d 782, 786 (1961).

CONCLUSION

For the foregoing reasons, the Review Board's Decision and Order should be affirmed.

Respectfully submitted,

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February 12, 1965

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,943

JAMES R. WILLIAMS,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION.

Appellee.

Appeal from a Decision and Orders of the
Federal Communications Commission

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INDEX

TABLE OF AUTHORITIES

* Cases or authorities chiefly relied upon are marked by asterisks.

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REPLY BRIEF FOR APPELLANT

COUNTERSTATEMENT OF CASE

Appellee's counterstatement of the case is so inadequate and incomplete as to contribute little to an understanding of the questions presented by this appeal.

In discussing the services which Appellant's proposed station would render, Appellee merely noted that a new service would be provided to 374,772 persons (Appellee's Brief, Page 4), but failed to state that interference-free primary service would be provided to an

area of 21,667 square miles (R. 141, line 7), to all areas and persons within 62 miles of Anadarko, (R. 137), and to some areas and persons as far as 97 miles from Anadarko (R. 137).

The discussion of the interference which Appellant's proposed operation would cause to cochannel stations KWMT, Fort Dodge, Iowa, and KNOE, Monroe, Louisiana (Appellee's Brief, Page 4), failed to note the significant facts that the interference to KWMT would fall more than 200 miles from Fort Dodge (R. 148) and the interference to KNOE would occur more than 120 miles from Monroe (R. 151). If the interference to those stations is of any significance to the questions presented by this appeal, and Appellant respectfully submits that it does not, the location of the interference areas is important in weighing the impact of the interference.

On page 5 of its brief, Appellee stated that "The Hearing Examiner concluded that a waiver of the ten per cent rule was warranted in view of the fact that Anadarko and Caddo County were without a local radio station and accordingly, granted Williams application (R. 250)." The fact that "Anadarko and Caddo County were without a local radio station" was but one of many considerations which led to the Hearing Examiner's grant of Appellant's application. The Hearing Examiner made extensive and detailed findings of fact concerning the unique characteristics and needs of Anadarko, Caddo County and surrounding areas resulting, in part, from the large number of American Indians in the area (R. 238-239, 241-242), and he concluded that the stations which provide primary service to Anadarko do not satisfy the needs of the residents of Anadarko, Caddo County and surrounding areas for a local station, *i. e.*, a transmission service (R. 245-249).

Appellee's discussion of Appellant's exceptions, and particularly the statement that "Williams urged as an additional ground for waiver, among other things, that Anadarko was an unusual community with unique needs" (Appellee's Brief, Page 5), is grossly erroneous. As

noted in the preceding paragraph, the Hearing Examiner made extensive findings and conclusions in his Initial Decision that "Anadarko is an unusual community with unique needs" (R. 238-239, 241-242). Appellant's three exceptions and his brief in support of the Initial Decision and his exceptions related only to engineering considerations (R. 252-254, 255-259).

In discussing the fact that "Anadarko already received service from six other broadcast stations" (Appellee's Brief, Pages 6-7), the Appellee avoided all mention of the fact that the stations provide only reception service and are located from 18 to 80 miles from Anadarko (R. 190).

No useful purpose will be served by discussing Appellee's incomplete treatment of the final Decision as adopted by only two of the three participating members of the Review Board, as the errors in the Decision are the subject of this appeal.

The Appellee understandably failed to discuss the extremely strong and detailed dissent of Review Board Member Nelson (R. 315-317), who concurred with the Hearing Examiner's conclusions concerning the unusual characteristics and unique needs of Anadarko and the area, stated that "... the showing of needs in this case consisted of *affirmative, uncontroverted* evidence ...", and concluded:

> "I believe that a showing of special circumstances was made in this case by the presentation of evidence indicating the unusual characteristics of Anadarko and by evidence indicating *affirmatively rather than presumptively* that a need exists for a local outlet in Anadarko. Accordingly, a grant is warranted on the basis of Commission precedents, or a logical extension thereof ..." (R. 317).

The questions presented by this appeal and the arguments presented in the briefs require that careful and detailed attention be given to both the Initial Decision of the Hearing Examiner and the dissent of Board Member Nelson.

ARGUMENT

I.

The Ten Per Cent Rule Discriminates Against the Smaller Communities in Violation of Section 307(b) of the Act and, Therefore, is Invalid

The threshhold question presented by this appeal is whether the ten per cent rule, Section 73.28(d)(3) of the Commission's Rules, 47 CFR §73.28(d)(3), is invalid.[1]

In support of its contention that the rule is invalid, Appellant demonstrated in his brief that the rule so discriminates against smaller communities and rural areas throughout the United States as to defeat the basic objective of Section 307(b) of the Communications Act of 1934, as amended, 47 USC §307(b), 49 Stat. 1475, which directs the Commission to make a fair, efficient, and equitable distribution of radio service and stations among the several States and communities. Appellant showed that each and every ten per cent rule decision of the Commission cited in either the Initial Decision or final Decision in this proceeding involved a small community, many remote from principal centers of population.[2] (Appellant's Brief, Pages 28-30).

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[1] One of the questions agreed to by the parties in the stipulation approved by the Court on November 16, 1964, is as follows:

> "Whether Section 73.28(d)(3) of the Commission's Rules, as interpreted and applied in this proceeding, violates the basic purposes for which the Commission was created and various provisions of the Communications Act of 1934, as amended, including Sections 301, 303, and 307(b)"

Through inadvertence, Section 301 was listed instead of Section 1. Counsel for Appellee has informally agreed to the correction and substitution.

[2] Except for Inter-Cities Broadcasting Company, 34 FCC 751, 25 Pike & Fischer Radio Regulation 404 (1963), which involved a suburb of Detroit, Michigan, none of the communities was as large as 20,000 population. The population of the community in each of the other decisions was as follows: Southern Indiana Broadcasters, Inc., 24 FCC 521, 15 RR 349 (1958), Lawrenceville, Indiana,

(Continued on Page 5)

It is most significant that the Appellee has elected not to discuss Appellant's convincing showing that Section 73.28(d)(3) discriminates against the smaller communities and rural areas other than to state, in footnote 13 of its brief, that the argument foreclosed by *Guinan* v. *Federal Communications Commission,* 111 U.S. App. D.C. 372, 374, 297 F.2d 782, 785 (1961), and *Sunshine State Broadcasting Co., Inc., (WBRD),* v. *Federal Communications Commission,* 114 U.S. App. D.C. 271, 273, 314 F.2d 276, 278 (1963). (Appellee's Brief, Page 14, footnote 13).

It will be shown that neither of those decisions is applicable of controlling and that the legislative history of Section 307(b) of the Act fully supports Appellant's argument that the ten per cent rule, Section 73.28(d)(3), is invalid.

A.

Prior Decisions Relied Upon By Appellee In Its Brief Are Not Controlling

The Appellee, in its brief, has relied chiefly upon the *Guinan* and *Sunshine State* decisions, as noted above, and upon *Sayger* v. *Federal Communications Commission,* 114 U.S. App. D.C. 112, 312 F.2d 352 (1962). A review of the briefs and opinions of each appeal discloses that the precise question presented here was not before the Court in any of the three appeals.

(Continued from preceding page)
population 6,328; Reilly and Spates, 24 FCC 257, 14 RR 985 (1958), Bridgehampton, New York, population 1,200; Louis Adelman, 28 FCC 432, 18 RR 97 (1960). Carmel, Pennsylvania, population 14,222; Charles J. Lanphier, 31 FCC 212, 20 RR 282 (1961), Hopkins and Edina, Minnesota, populations 7,595 and 9,744; Hammonton Broadcasting Company, 21 RR 199 (1961), Hammonton, New Jersey, population 8,411; Old Belt Broadcasting Co., Inc., 28 FCC 751, 25 RR 404 (1963), Deer Park, New York, population less than 2,500; Stephens County Broadcasting Co., Inc., 80 FCC 921, 21 RR 414 (1961), Toccoa, Georgia, population 6,781; Alexandria Broadcasting Corp., 31 FCC 755, 22 RR 411 (1961), Morris, Minnesota, population 4,199; Birch Bay Broadcasting Company, Inc., 35 FCC 445, 1 RR 2d 333 (1963), Blaine, Washington, population 1,735; and Minnesota Valley Broadcasting Co., Inc., 11 RR 1080 (1955), Mankato, Minnesota, population 18,809. The population of Appellant's community, Anadarko, Oklahoma, is 6,299.

The question here is whether the ten per cent rule, Section 73.28(d)(3), so discriminates against the smaller communities and rural areas as to defeat the basic objective of Section 307(b) of the Act, which directs the Commission to make a fair, efficient and equitable distribution of radio service and stations among the several States and communities.

The question before the Court in the *Guinan* appeal is summarized in the following from the opinion:

> "Appellant urges that the Commission was arbitrary and capricious in its refusal to grant a waiver of Section 3.28(c) [now 73.28(d)(3)] of its rules, and that, in so doing, it improperly disregarded the provisions of Section 307(b) of the Communications Act of 1934, as amended, and relevant and material evidence of record ...."

The Appellant there did not argue that the rule itself was invalid. Based upon the arguments and facts *before it at that time,* the Court held as follows:

> "The Commission has been entrusted with the task of providing for the orderly use of available radio facilities throughout the United States, and, in order to reduce this task to a practical operation, it adopted, among others, Rule 3.28(c) [now §73.28(d)(3)], which has become known as the '10% Rule.' This rule sets up a standard for dealing with applications which disclose objectionable interference, and at the same time recognizes the necessity for a fair, efficient and equitable distribution of the limited number of frequencies. That the adoption of such a rule by the Commission is a proper, indeed a necessary exercise and implementation of the power committed to it by the Communications Act is too fundamental a proposition to admit of argument."

Sunshine State involved a contention that the ten per cent rule, then Section 3.28(d), was invalid because the Commission should be required to consider interference questions on a case-by-case basis rather than through use of a rule. The Commission, in its brief, said

that Appellant's argument was largely foreclosed by the *Guinan* decision, and citing *Securities & Exchange Commission* v. *Chenery Corp.* 332 U.S. 194, 203, and *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D.C. 342, 345, 210 F.2d 24, 27, argued that the choice between proceeding on a case-by-case basis or by a general rule is a matter lying primarily within the discretion of the Commission. Based upon the arguments and facts *before it at that time,* the Court held as follows:

> "Appellant also says that the ten per cent rule is unduly restrictive and should be abandoned in favor of a new criterion. Whether so or not is a matter for the Commission to determine."

The *Sayger* appeal did not present a challenge to the validity of the ten per cent rule, then Section 3.28(d)(3), but presented the contention that the Commission had failed to consider the provisions of Section 307(b) of the Act when refusing to waive the rule. Based upon the arguments and facts *before it at that time,* the Court first stated:

> ". . . While in determining the public interest the ten per cent requirement may not be applied mechanically, §3.28(d) was not intended to be merely a guide, but a 'fixed, certain rule' to be waived 'only in unusual circumstances in which it is clearly demonstrated that the public interest requires such exceptional action'[4]. . .
>
> ---
>
> "[4] Report and Order of August 4, 1954, In The Matter Of Amendment of Section 1 of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations, 10 Pike & Fischer RR 1595, 1600 (1954). Compare Beaumont Broadcasting Corp. v. Federal Communications Commission, 91 U.S. App. D.C. 111, 115-116, 202 F.2d 306, 310 (1952);"

and then concluded:

> "The delicate balance in the public interest to be achieved by the assignment of radio frequencies is a matter committed to the expertise of the Commission. This record shows no arbitrary or capricious action, or violation of procedural safeguards, on the part of the Commission in complying with its obligation under the Act."

Each of those three appeals were directed to the manner in which the Commission applied its expertise and exercised its discretion, first, in deciding to adopt a general rule rather than proceed on a case-by-case basis, and second, in refusing to waive the ten per cent rule. Here, however, the particular question under discussion is whether the Commission, in applying its expertise and exercising its discretion, has adopted a rule which is inconsistent with Section 307(b) of the Act. It is respectfully submitted that the showing in Appellant's brief, which the Commission has elected not to answer except by reliance upon inapplicable decisions, conclusively proves that the Commission exceeded its discretion in adopting the ten per cent rule, Section 73.28(d)(3).

B.

The Legislative History Of Section 307(b) Of The Act Supports The Conclusion That The Ten Per Cent Rule Is Invalid

The Communications Act, as enacted in 1934, contained two sections which were repealed just two years later. Section 302 divided the continental United States into five geographical zones. Section 307(b) directed the Commission to make an equitable distribution of radio service, both transmission and reception, between the five zones and among "... each of the States and the District of Columbia, within each zone, according to population..."

In 1936, Senator Burton K. Wheeler sponsored an amendment to repeal Section 302 and to amend Section 307(b) to substitute the more general language of Section 307(b) as it now exists. The reports and debates vividly prove that Congress was concerned over the needs of the smaller communities and rural areas for their own readily accessible stations.

In *House Report No. 2589,* Seventy-Fourth Congress, Second Session, dated May 6, 1936, the following appears on page 3 concerning

Senator Wheeler's bill, S. 2243:

> "The legislation is recommended for practical reasons of administration by the Communications Commission, which has found that the drawing of artificial zone lines for guides in allocating radio facilities cannot satisfactorily be applied because of the physical laws governing radio transmission. As a consequence, the policy of Congress to distribute radio facilities so that every section of the country will be supplied, has been very difficult of effectuating.
>
> "On May 23, 1935, the Chairman of the Communications Commission wrote the Chairman of the Senate Interstate Commerce Committee as follows:
>
> " 'With further reference to S. 2243 1935, I beg to advise that this Commission favors its adoption for the following reasons:
>
> 'The existing law, which S. 2243 seeks to repeal, is contrary to the natural laws and has resulted in the concentration of the use of frequencies in centers of population, and the restriction of facilities in sparsely populated states, even though interference considerations would permit the operation of one or more additional stations. Because of the size of the zones provided for by existing law, the distribution required by the Davis amendment [by which the zones were established] has resulted in providing ample broadcast service in large zones. The experience of the Federal Radio Commission and this Commission has proved that the Davis amendment is very difficult to administer and cannot result in an equality of broadcast service.
>
> 'This Commission is, therefore, in hearty accord with and favors the passage of S. 2243.' "

During the debate by the Senate on S. 2243, the following explanation by Senator Wheeler on April 24, 1936 appears on pages 6032 and 6033 of the *Congressional Record,* Volume 80, Part 6, Seventy-Fourth Congress, Second Session:

> "SENATOR WHEELER — Let me say to the Senate that when the Davis amendment was adopted, the former Senator from Washington, Mr. Dill, and myself, and other Senators from the West were very anxious that the bill should become law. Subsequently, however, we found that the operation of the so-called Davis amendment has discriminated against the West, because of the fact that the zones in the West are so large and the zones in the East are so small. Consequently, the big cities of the country, as well as New York, have found that the law works all right; but in the case of the larger zones in the West and Middle West it has hampered us in securing the facilities we ought to have to meet the demands of that section of the country.

The present language of Section 307(b) was adopted following Senator Wheeler's explanation of S. 2243.

The need of small communities and rural areas for their own stations was recognized as long ago as 1924. In a letter to Congressman White of Maine, dated December 9, 1924, Herbert Hoover, then Secretary of Commerce, stated[3]:

> "The public interest of radio broadcasting is rapidly widening, entertainment and amusement have ceased to be its principal purposes. The public, especially our people on farms and in isolated communities, are coming to rely on it for the information necessary to the conduct of their daily affairs. It is rapidly becoming a necessity, and they rightly feel that since the public medium of the ether is used to reach them, that they have a direct and justifiable interest in the manner in which it is conducted."

These quotations from the legislative history of Section 307(b) of the Act, as amended in 1936, further support Appellant's contention that the Commission may not lawfully adopt and apply any rules which would have the practical effect of discriminating against proposals to establish new stations, and particularly the first station, in small communities located in rural areas remote from principal centers of population.

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[3] Congressional Record, Volume 68, Part 3, Page 2579, May 27, 1927.

C.

Appellee Failed To Discuss The Provisions Of Section 1 Of The Act

Appellant noted in his brief that Section 1 of the Communications Act of 1934, as amended, 47 USC § 151, 48 Stat. 1064, states that the Federal Communications Commission was created for the purpose of "... making available, so far as possible, to all of the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communications service ...." (Appellant's Brief, Pages 13, 29). Appellee did not comment upon the applicability of Section 1 to this appeal.

It is clear from Section 1 that the Commission was established to *provide service* to the public, not to withhold service. In enacting Section 307(d) of the Act, 48 Stat. 1064, limiting the term of a broadcast station license to three years, in enacting Section 304 of the Act, 48 Stat. 1064, requiring each licensee to sign a waiver of any claim to a particular frequency, and in enacting Section 307(b) to permit new parties to seek the facilities of an existing station at the end of its three-year license period, Congress provided a procedure for replacing an inequitable or inefficient assignment with one which would more fully satisfy the "...fair, efficient and equitable distribution of radio service..." objective of Section 307(b). Congress clearly recognized that needs and conditions change throughout the country with the passage of time and intended to provide procedures for accomplishing readjustments to meet them.

The ten per cent rule, Section 73.28(d)(3), by its very terms, considers only the negative or undesirable effects of a proposed assignment and, as interpreted and applied by the Commission in this proceeding, permits no consideration to the positive effects, namely, providing service as contemplated by Section 1 of the Act. The rule fails to satisfy the basic objectives of Section 1 and, therefore, is invalid.

D.

A Decision Holding The Rule Invalid Will Not Mean That A Valid Rule Cannot Be Adopted And Applied

The adoption of rules to reduce the task of providing for the orderly use of available radio facilities throughout the United States has been endorsed and approved by this Court in *Guinan* and *Sunshine State, supra.* The Commission, by application of its expertise, most certainly can develop and adopt a modified version of Section 73.28(d)(3) which will not unduly discriminate against the smaller communities and rural areas remote from principal centers of population which do not have available a readily accessible broadcast station to serve their local needs. It is respectfully submitted that the decision here need only be that the particular rule is invalid but need not be so broad as to prohibit use of general rules in considering applications for new or improved stations.

II.

Appellee Has Not Satisfactorily Answered Appellant's Contention That the Review Board Unlawfully Penalized Appellant For Failing To Submit Evidence of Program Proposals.

Section II of Appellant's argument was directed to the Review Board's reference to and according great weight to the fact that Appellant did not offer evidence concerning his program plans and policies.

> "However, we are of the opinion that Williams has not satisfactorily shown that Anadarko and the wide area to be served, especially the latter, has any special needs *or that his proposed programming is designed to meet special needs.*" (R. 311) (Italics supplied).

Appellant argued that the Commission had twice stated that evidence of his proposed programming *was unnecessary to resolve any issue in the hearing,* first when it designated Appellant's application for

hearing without a program issue (R. 81-83), and second when it denied a petition of Olney Broadcasting Company, a former applicant and party to the hearing, for addition of an issue to determine if his proposed program service "... designed for and would serve his service area." (R. 114). (Appellant's Brief, pages 17-19). Appellant then argued:

> "If the Review Board, after review of the evidence and the Initial Decision, believed that evidence concerning Appellant's program proposal was necessary to support a grant of the application, it should have set aside the Initial Decision, added a program issue, and ordered a further hearing." (Appellant's Brief, Page 19).

Appellant's answer was twofold. First, the party requesting the addition of the programming issue "... did not contest the substance of the programming itself, but alleged that the proposal was essentially a copy of one that Williams had previously filed in an application for a standard broadcast station at Winfield, Kansas, thus raising a question as to its suitability for an entirely different community." (Appellee's Brief, Pages 3, 22). Second, Appellee cited *Huntington-Montauk Broadcasting Co., Inc.*, 25 FCC 1309, 1318-1319, 16 RR 173, 183-184 (1958), in support of its contention that Appellant could have offered evidence concerning his program proposals under the waiver clause of the Section 73.28(d)(3) issue had he so desired. (Appellee's Brief, Page 23).

The answer to Appellee's first contention is very simple. First, as stated in the Commission's Order denying the request for a program issue, the petitioner, Olney Broadcasting Company, had requested "... addition of an issue to this proceeding, to determine whether the proposed program of service William was designed for and would serve his service area." (R. 114). Second, although the Commission's Broadcast Bureau was a party to the hearing, and through its Hearing Division counsel, actively participated in every phase of the hearing for the purpose, as

stated in Section 0.71 of the Commission's Rules, 47 CFR §0.71,[4] of assisting in the development of all relevant and material facts having a bearing upon the public interest aspects, it never once mentioned the possibility that programming evidence might be desirable until the end of its oral argument before the Review Board on exceptions to the Initial Decision. At the oral argument, in response to questions by Board Member Nelson, counsel for the Broadcast Bureau merely stated that programming evidence "... could have been introduced in seeking a waiver of the 10 per cent rule." (R. 50, L 21-25)

Appellant respectfully submits that he cannot be expected to guess as to what evidence the Review Board or the Commission might find desirable long after the hearing record has been closed and the Initial Decision issued. Section 309(e) of the Communications Act, 47 USC §309(e), 74 Stat. 889, specifically requires the Commission to notify an applicant of reasons why the required public interest, convenience and necessity finding cannot be made so that the applicant can submit additional facts. The Commission, by its Review Board, unlawfully penalized Appellant for not having submitted program evidence by engaging in "second guessing" in violation of all rules of fair play, including Section 309(e) of the Act.

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4 Section 0.71 provides, in pertinent part, as follows:

"§0.71 Functions of the Bureau:

The Broadcast Bureau assists, advises, and makes recommendations to the Commission with respect to the development of a regulatory program for the broadcast services and is responsible for the performance of any work, function, or activities to carry out that program in accordance with applicable statutes, international agreements, rules and regulations, and policies of the Commission. The Bureau performs the following functions:

* * * * * *

"(d) Participates in hearings involving applications, rule making and other matters which pertain to the radio broadcast services, including proceedings pursuant to sections 312 and 316 of the Communications Act of 1934, as amended."

The answer to Appellee's second contention may be found in the very decision upon which it relies, *Huntington-Montauk Broadcasting Co., Inc., supra.* Significantly, Appellee ended its quotation one sentence too soon and failed to include the following most significant statement:

> "As will be indicated in more detail, *infra,* the usual lengthy showing of programming proposals in which an applicant successfully demonstrates only that he proposes to operate in a manner consistent with the public interest *will not satisfy the showing of special need to which reference has been made."* (Italics supplied.)

Later, at page 1326, the Commission stated:

> "... Appellant's lengthy program showing discloses only that WGSM proposes to operate in a manner consistent with the public interest. It evidences no special area need for the proposed service. As we have pointed out above, WGSM provides no first primary service to anyone ...."

It is clear from *Huntington-Montauk* that the special needs cannot be shown by proposed program evidence but only by engineering evidence showing underserved areas. By stating that Appellant had offered no evidence that "... his proposed programming is designed to meet special needs," the Commission unlawfully sought to impose a burden impossible of being met.

In *Federal Communications Commission* v. *Allentown Broadcasting Corporation,* 349 U.S. 358, 75 S.Ct. 855 (1955), the Supreme Court noted with approval the Commission's contention that the needs of one community for a new radio service cannot be subordinated to the ability of an applicant for another locality. That decision requires the conclusion that the needs of a community must be determined from all of the facts concerning its characteristics and broadcast services available and not from the program proposals of an applicant. If this is not so, an applicant could make such an elaborate showing of proposed programming which would subordinate the actual facts to his

proposal. It follows that programming evidence was not required in this proceeding and that Appellant was unlawfully penalized for not having offered evidence that "... his proposed programming is designed to meet special needs."

III.

In Contending That the Review Board Properly Weighed and Considered All the Relevant Evidence, Appellee Would Impose an Undefined Standard Impossible To Be Met

Appellant contended in his brief that the facts fully support a waiver of the ten per cent rule and a grant of his application. (Appellant's Brief, Pages 22-28). In reply, Appellee argued that, in the Review Board's judgment, the facts "... did not constitute a substantial showing of exceptional or unique needs to warrant a waiver of the 10% rule." (Appellee's Brief, Page 20).

If the Commission is to contend that the evidence presented in a hearing does not establish "unique" or "special needs", and is not "... substantial enough ... warrant a waiver of the 10% rule," it must set forth some definition of the terms and some definite standard to be met. Otherwise, the Commission always can merely say that the evidence is "not substantial enough" to support a requested conclusion. Under such circumstances, judicial review would be meaningless.

Of course, earlier decisions of the Commission may be used as a guide, if applicable. A review of the many decisions involving the ten per cent rule, Section 73.28(d)(3), cited by both Appellant and Appellee discloses that Appellant here offered far more extensive evidence concerning the characteristics and needs of Anadarko, Caddo County and surrounding areas than was offered in any one of the other proceedings. In most, the evidence merely was limited to engineering showings of the number of reception services from distant stations to various areas to be served with transmission and reception service.

The person most familiar with the facts, other than Appellant and his counsel, was the Hearing Examiner. It is most significant that the Hearing Examiner first considered and made findings upon all of the evidence of record, then analyzed the facts and findings in the light of numerous authorities, and finally concluded that Appellant had conclusively established such unique characteristics and needs of Anadarko, Caddo County and surrounding areas that the public interest required a waiver of the ten per cent rule and a grant of the application. It is most significant that one of the three participating board members, Board Member Nelson, shared the views of the Hearing Examiner, quoted at length from his Findings in the Initial Decision, and then concluded that "... the showing of need in this case consisted of *affirmative, uncontroverted* evidence." (R. 317).

It is readily apparent from both the final Decision and Appellee's arguments that the Review Board actually considered all evidence of the characteristics of Anadarko, Caddo County and surrounding areas as either irrelevant or immaterial, even though the Hearing Examiner, in receiving the evidence, had expressly ruled that the evidence was relevant and material. By concluding that the evidence did not establish "unique or special needs" and was "not substantial enough," the Review Board actually engaged in a selection process which violated Section 8(b) of the Administrative Procedure Act, 5 USC §1007(b), 60 Stat. 237, and the principles enunciated in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 71 S.Ct. 456 (1943).

The earlier decisions of the Commission do not provide any definitions or standards which must be met by an applicant in seeking a waiver of the ten per cent rule. Nor does the final Decision in this proceeding, other than the strong dissent of Board Member Nelson, offer any assistance. It is respectfully submitted that the Decision must be set aside and the proceeding remanded to the Commission with instructions to set forth clear and concise definitions, guide lines and standards for seeking waiver of the ten per cent rule.

IV

It Is Most Significant That Appellee Failed To Answer, Let Alone Comment Upon, Appellant's Contention That His Proposal Satisfies the Objectives of the Ten Per Cent Rule.

As recently as January 24, 1964, the Commission repeated once again that the basic objective of the ten per cent rule, Section 73.28(d)(3), is to prevent the grant of an application where the proposed operation would "... suffer interference to such an extent that its service would be reduced to an unsatisfactory degree." *Reese Broadcasting Corp.*, 1 RR 2d 1061, 1063, (1964)[5].

Appellant then argued as follows:

> *"The facts conclusively prove that the proposed station would not 'suffer interference to such a degree that its service would be reduced to an unsatisfactory degree.'* No interference would fall closer than 62 miles from Anadarko. In some directions, interference-free service would be provided to 374,772 persons in an area of 21,576 square miles. Primary service of 2 millivolts per meter would be provided to every person and every city within 33 miles of Anadarko." (Appellant's Brief, Page 26).

Appellant also argued:

> "Section 73.28(d)(3) is based upon population, not area. Population is not distributed uniformly throughout the Nation, throughout a State, or even throughout a County. An applicant for a station in a particular community which he believes needs service has no control over the population distribution, but must

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[5] In its Report and Order by which Section 73.28(d)(3) was adopted, In the Matter of Amendment of Section 1 of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations, 10 RR 1595 (1954), at page 1597, stated:

> "6. The present 10% rule exemplifies this balancing procedure: An assignment could be made if no objectionable interference were caused to an existing station (or if the need for the proposed service outweighed the need for that portion of the service of an existing station lost by interference (footnote omitted) and if 90% of the population within the proposed station's normally protected contour would be served. This latter requirement is imposed chiefly so as to insure an efficient utilization of available facilities..." (Italics supplied.)

> accept it as it exists. Whether compliance with Section 73.28(d)(3) will be achieved almost always is not under the control of the appellant." (Appellant's Brief, Page 29).

Appellee elected not to attempt to answer those arguments and, therefore, tacitly agrees with Appellant that his proposed operation would satisfy the chief and basic objective of the ten per cent rule. For this reason alone, the Decision must be set aside.

CONCLUSION

Only the most significant portions of and omissions from Appellee's brief have been discussed in this reply. The three cases particularly relied upon by Appellee, *Guinan, Sayger* and *Sunshine State*, are not controlling. When consideration is given to the entire record, the briefs of the parties, and the authorities cited, the conclusion can only be that the Decision of the Commission should be set aside and reversed and the proceeding should be remanded to the Commission with instructions to grant Appellant's application and such other relief as this Court may direct.

Respectfully submitted,

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March 8, 1965.

APPENDIX

STATUTES AND RULES INVOLVED

The relevant parts of the Statutes and Rules to which references are made in Appellant's reply brief follow:

STATUTES

COMMUNICATIONS ACT OF 1934, AS AMENDED, 47 USC § 151, *et seq.*

Section 304.

> No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the either as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Section 307(b).

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 307(d).

> No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that

affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

Section 309(a).

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 309(e).

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing

in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.